

***United States Court of Appeals  
for the Second Circuit***



**JOINT APPENDIX**

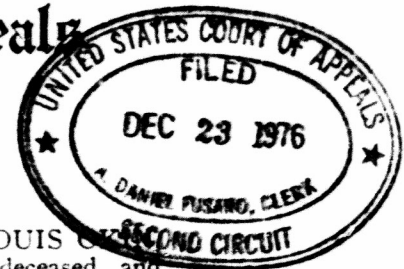


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76-7382

**United States Court of Appeals**

**For the Second Circuit**



CHARLES R. WOLFSON, RICHARD R. WOLFSON and LOUIS C. WOLFSON,  
as Executors of the Estate of NATHANIEL C. WOLFSON, deceased, and  
HERBERT A. FUENTE,

*Plaintiffs-Appellants,*

*against*

STEIN ROE & FARNHAM, STEIN ROE & FARNHAM STOCK FUND,  
INC., STEIN ROE & FARNHAM BALANCED FUND, INC., and HENRY  
THIELBAR,

*Defendants-Appellees and Cross-Appellants,*

R. DOUGLASS COOPER, CHARLES FARNHAM, HARRY HAGEY, JR.,  
LAWRENCE HICKEY, LEMUEL HUNTER, JOHN JEUCK, SYDNEY  
STEIN, JR., RICHARD TEMPLETON, JOHN TITTLE, ROBERT  
WOODS, SR&F SERVICE CORPORATION, WACKER-ADAMS DATA  
SERVICE CORP.,

*Defendants.*

**On Appeal from the United States District Court  
for the Southern District of New York**

**JOINT APPENDIX**

MARKEWICH ROSENHAUS MARKEWICH  
& FRIEDMAN, P.C.

*Attorneys for Plaintiffs-Appellants*  
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and Cross-Appellants Stein Roe &  
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*pages 1-10  
10/10*

PAGINATION AS IN ORIGINAL COPY

## TABLE OF CONTENTS

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	PAGE
Docket Entries	1A
Endorsed Decision and Order on Motion to Amend and Supplement	5A
Amended and Supplemental Complaint	8A
Pre-Trial Order	31A
Supplement to Pre-Trial Order	51A
Trial Transcript	53A
Memorandum Opinion	184A
Order and Judgment Below, as Amended	201A
Affidavit of Bennett Frankel	203A
Order Amending Memorandum Opinion	204A

### TESTIMONY

#### *Witness for Plaintiffs*

Jon Edward Quint:	
Direct	58A

#### *Witnesses for Defendants*

Robert A. Woods:	
Direct	58A
Cross	104A
Richard Douglass Cooper:	
Direct	112A
Cross	122A
Lemuel B. Hunter:	
Direct	133A
Cross	142A

I

EXHIBITS

Printed  
Page

*For Plaintiffs:*

1-161—Received in Evidence at page 56A —

1A-161A—Received in Evidence at page 57A —

*For Defendants:*

A-1 for Identification—Received in Evidence at page  
67A —

A-DT—Received in Evidence at page 67A —

DX-DJ—Information Booklet 169A

**CIVIL DOCKET**  
**UNITED STATES DISTRICT COURT**

**JUDGE PIERCE**

Jury demand date:

1A  
**72 CIV 2238**

C. Form No. 106 Rev.

**TITLE OF CASE**

**ATTORNEYS**

**CHARLES A. WOLFSON RICHARD R. WOLFSON AND LOUIS  
 AS EXECUTORS OF THE ESTATE OF NATHANIEL C. WOLFSON,  
 HERBERT A. FUENTE**

For plaintiff:

**AGAINST,**

**DOUGLAS COOPER,  
 LES FARMER,  
 Y HAGEN JR.,  
 JEROME HICKY,  
 AL EUNTER,  
 JERCK,  
 EY STEIN, JR.,  
 HAD TEMPLETON,  
 THIEDEER,  
 IN TITTELE,  
 DEFT WOLDS  
 & F SERVICE CORPORATION.  
 EIN, ROE & FARMER STOCK FUND, INC.  
 STEIN ROE AND FARMER BALANCED FUND, INC.**

For defendant:

**SULLIVAN & CROMBELL  
 18 Wall St.  
 New York N.Y. 10005 (Certain debts.)**

**SOBENSCHEIN CABLE MATH & ROSENTHAL  
 800 C SEARS TOWER,  
 CHICAGO, ILLINOIS 60606  
 876-8000 (FOR DEFT: BALANCED FUND.)  
 Vedder Price Kaufman & Kamholz  
 800 3rd Ave. N.Y.C. 10022  
 (Stein Roe et ano)**

**STATISTICAL RECORD**

5 mailed

X

6 mailed X 6-22-76

s of Action:

OCKHOLDER SUIT.

oh arose at:

Clerk

Marshal

Docket fee

Witness fees

Depositions



DATE

NAME OR  
 RECEIPT NO.

REC.

DISC.

JUDGE PIERCE

72 CIV 223

DATE	PROCEEDINGS	2A	Date On Judgment
Jun 23-72	FILED COMPLAINT & ANSWERS.		
Jun 7-72	Filed Pltffs. Request for production, inspection and copying.		
Jun 12-72	Filed pltffs' Affidvt. and Show Cause Order for Preliminary Injunction. Ret. 6-13-72. Cannella, J.		
Jun 13-72	Filed (in court) Pltffs. Memorandum of Law.		
Jun 13-72	Filed (in court) Affidavit of Robert A. Woods.		
Jun 13-72	Filed (incourt) Dfts. Memorandum in opposition to motion for preliminary injunction.		
Jun 14-72	Filed MemorEnd. on Order to Show Cause 6/12/72. Pltffs. Motion for preliminary-injunction is denied. Cooper J.		
Jun 26-72	Filed Stip & Order extending time for dfts. to answer to complaint to 8/1/72. So Ordered Gurfain J		
Jul 10-72	Filed stip and order that time of all dfts to answer the complaint is extended to 8-15-72 Briant J.		
Jul 19-72	Filed Objection of Dfts. Stein Roe & Farnham, Stein Roe & Farnham Balanced Fund, Inc. etc. to Pltffs' Request for Production, etc.		
Jul 24-72	Filed Request for Production, inspection and copying.		
Aug 3-72	Filed summons with marshal's ret. Served R. Douglass Cooper by Mr. Thielban on 6-14-72 Served Charles Farnham by Mr. Thielban on 6-14-72 Served Harry Hagey Jr. by Mr. Thielban on 6-14-72 Served Lawrence Hickey by Mr. Thielban on 6-14-72 Served Lemuel Hunter by Mr. Thielban on 6-14-72 Served John Jauck by Mr. Thielban on 6-14-72 Served Sydney Stein Jr. by Mr. Thielban on 6-14-72 Served Richard Templeton by Mr. Thielban on 6-14-72 Served Henry Thielbar by personally on 6-14-72 Served John Tittle by Mr. Thielban on 6-14-72 Served Robert Woods by Mr. Thielban on 6-14-72 Served SR & F Service Corp. by Robert Markewich on 6-5-72 Served Wacker Adams Data Service Corp. by Robert Markewich on 6-5-72 Served Stein Roe & Farnham by Mr. Thielban on 6-14-72 Served Stein Roe & Farnham Stock Fund Inc. by Mr. Thielban on 6-14-72 Served Stein Roe & Farnham Balanced Fund Inc. by Mr. Thielban on 6-14-72		on 6-14-72
Aug 16-72	Filed ANSWER of dfts' Stein Roe & Farnham, Wacker-Adams Data Service Corp., SR & F Service Corp. and Henry B. Thielbar, to the complaint.		S&O
Aug 17-72	Filed dfts notice of motion. Re: Dismiss Action. Ret. 9-5-72		
Aug 17-72	Filed dfts' memorandum in support of motion to dismiss.		
Aug 17-72	Filed certain dfts notice of motion. Re: Transfer Ret. 9-5-72		
Aug 17-72	Filed certain dfts memorandum in support of motion.		
Aug 17-72	Filed stipulation and order extending time within which all of the defendants may respond to pltffs' Request for Production, etc., until 30 days after this Court decides the motions of certain defendants to dismiss or transfer this action. So ordered. Casliardi, J.		
Aug 16-72	Filed stipulation adjourning motion now ret. 9/5/72 to 11/21/72. (by Wacker-Adams Data S		
Aug 16-72	Filed stipulation adjourning motion now ret. 9/5/72 to 11/21/72 (by Stein Roe & Farnham and Henry Thielbar)		
Nov 28-72	Filed memo endorsed on motion filed Aug 17th, 1972: Motion Withdrawn per stipulation of the parties, So Ordered, Pierce, J.		
Nov 28-72	Filed stip & order that the motion of certain dfts to dismiss or transfer this is hereby withdrawn, Pierce, J.		
Nov 28-72	Filed memo endorsed on motion filed Aug 17th, 1972: Motion withdrawn per stipulation of the parties dated, 11-20-72. So ordered, Pierce, J.		
Dec 20-72	Filed response of dfts Stein Roe, and Stein Roe & Farnham Stock Fund Inc. to pltffs' request for production, inspection and copying.		
Jan 10-72	Filed response of debt Stein Roe & Farnham to pltffs' request for production.		

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CONTINUED - To PAGE 2

PAGE 2

20 Rev. Civil Docket Continuation

IN	PROCEEDINGS	Date Order or Judgment Noted
20-72	inspection and copying.	
21-74	<i>Pre Trial Conference held</i>	
2-74	Filed Deft. Stein Roe & Farnham Stock Fund Inc. ANSWER.	VPKTD
2-74	Filed Deft. Stein Roe & Farnham Balanced Fund Inc. ANSWER. (mailed rule 384)	83-73
10-74	<i>Pre Trial Conference held - Reference to Mag. for all further</i>	
13-74	Filed Order that this matter is referred to Magistrate Raby as indicated.	
	Pierce J. (mailed notice)	
31-74	Filed pliffs. notice of deposition of Seth L. Szold, et al. on 11-18-74.	
7-74	PRE-TRIAL CONFERENCE HELD BY RABY	
7-75	PRE-TRIAL CONFERENCE HELD BY RABY	
29-75	Filed notice of change of address of deft's (Stein Roe & Farnham Stock Fund Inc)	
	Mailed Rules 3 & 4.	
27-75	PRE-TRIAL CONFERENCE HELD BY RABY	
9-75	Filed pre-trial order--Pierce, J.--consented to.	
29-75	Filed Notice that Sonnenschein Carlin Math & Rosenthal has changed address to 8000 Sears Tower, Chicago, Illinois, 60606.	
1-75	Filed notice of reassignment and pre-trial conference to Judge Boldt. (m/n)	
	Mailed notice of reassignment to Judge Pierce	
7-75	Filed Pliffs. Notice of Motion to amend complaint. Ret. Sine Die.	
7-75	Filed Pliffs. Proposed Findings of Fact.	
7-75	Filed Pliffs. Memorandum of Law.	
7-75	Filed Affidavit by Dorothy M. Schlip of service of Memorandum & Proposed Findings upon Bennett Frankel, esq. for pliff. on 10-06-75.	
7-75	Filed Defts'. (Stein Roe & Farnham, et al.) proposed findings of fact & conclusions of law.	
7-75	Filed Defts'. (Stein Roe & Farnham, et al.) pre-trial memorandum of law.	
7-75	Filed Order that the above action is referred to Magistrate Raby. M/N T.M.H.	
7-75	Filed letter of Pliff Atty Bennett Frankel dated 11-20-75 to Pierce, J.	
7-75	Filed memo endorsed on letter filed 11-20-75; The attached letter is deemed to be a request for modification of Reference of this Court dated 10-10-75. As such the request is granted etc, as indicated. Pierce, J. M/N	
7-76	PRE-TRIAL CONFERENCE HELD BY RABY	
7-76	Filed Pliffs Affidavit & Notice of Motion for an order granting to pliffs leave to serve an amended and supplemental complaint, etc, as indicated rthle before Pierce J. on 2-27-76.	
7-76	Filed memorandum of law in support of pliffs motion etc, as indicated.	
7-76	Filed defts memorandum of law in opposition to pliffs motion for leave to amend and supplement their complaint.	
7-76	Filed memo endorsed on motion filed 2-20-76. Pliffs motion is granted in all respects. Motion granted. Pierce, J. M/N	
7-76	Filed pliff verified and amended complaint.	
7-76	Filed ANSWER of deft Stein Roe & Farnham Stock Fund, Inc. PKK&D.	
7-76	Filed ANSWER of defts Stein Roe & Farnham Balanced Fund, Inc. to the complaint. PKK&D.	
7-76	Filed ANSWER of defts Stein Roe & Farnham Tucker-Adams Data Service Corp. Sr & Service Corp. and Henry B. Thielbar to the complaint. S&W.	
7-76	Before Pierce, J. Non-Jury Trial begun	
7-76	Trial concluded-Dec. Res.	
7-76	Filed Post Trial Brief of defts Stein Roe & Farnham and Henry Thielbar did. 4-29-76.	
7-76	Filed defts proposed findings of fact and conclusions of law.	
7-76	Filed pliffs memorandum after trial as indicated.	
7-76	Filed pliffs proposed findings of fact and conclusions of law as indicated.	
7-76	Filed Post Trial Reply Brief of defts Stein Roe & Farnham and Henry Thielbar.	

DATE	PROCEEDINGS	Date of Judgment
6-21-76	Filed complaint to original jurisdiction of law.	
6-21-76	Filed Petition for writ of habeas corpus.	
6-21-76	Filed Petition for writ of habeas corpus.	
6-21-76	Filed Opinion No. 11683: Having examined the petition and reviewed the applicable law, the Court now concludes that the petition is without merit and that the complaint, in its entirety, is without merit. Judgment shall be entered for costs dismissing all counts of the complaint with prejudice and without costs. Signed: J. Pierce, J. 1/16.	
6-21-76	Filed Order of the Court.	
6-21-76	PRE-TRIAL CONFERENCE HELD BY RAO.	
6-21-76	Filed Order that 25 of the Court's opinion in the 6-21-76 is corrected as follows, line 5. "20. Judgment shall be entered for costs dismissing all counts of the complaint with prejudice; each party shall bear its own costs. The Clerk is directed to attach a copy of this order to the opinion of 6-21-76. Pierce, J.	
6-30-76	Filed Order and Judgment that the costs shall be judgment on the merits dismissing the complaint to plaintiff's take nothing and that each party shall bear their own costs. Pierce, J. Judgment Entered. Pierce, J. 6-30-76.	
7-2-76	Filed Transcript of record of proceedings etc. 6-21-76.	
7-27-76	Filed Notice that plaintiff appeal to the U.S. Court of Appeals for the 11th Circuit from the order and judgment of the U.S. DIST. COURT entered on 6-30-76. U.S.	

A TRUE COPY  
RAYMOND F. BUEGHARDT, CLERK

BY Am. Gil  
Deputy Clerk

*[Handwritten mark]*

72 Civ. 2238, CHARLES R. WOLFSON v. R. DOUGLASS COOPER, et al.

ENDORSEMENT ORDER

By the attached papers, plaintiffs move pursuant to Rule 15(a), (c) and (d) to amend and supplement the complaint. The Court concludes that, in the interests of justice, the motion should be granted.

Plaintiffs bring this action derivatively under the Investment Company Act and the Investment Advisors Act, as well as under the securities acts. By this motion, plaintiffs seek to supplement the complaint to allege that the same conduct complained of has continued through 1975, and to seek relief for that period as well as the period preceding the filing of the original complaint. Further, plaintiffs seek to assert that the same conduct complained of in the original complaint is, for the period from June 14, 1972 to date, in violation of §36(b) of the Investment Company Act. The June 14, 1972 date is so specified since that date constitutes the effective date of the amended statute. Finally, aside from amendments which are truly minor in nature, plaintiffs also seek to allege that the conduct complained of in the original complaint also violates §15(a) of the Investment Company Act. In sum, plaintiffs seek to bring the complaint up to date and to allege that the same conduct constitutes violations of specific sections of the same sets upon which the complaint was brought.

In a very real sense, this motion is a result of the Court's order entered in October, 1975, directing the parties to prepare a supplemental pre-trial order with attention to plaintiffs' specifying the exact statutory sections upon which they will rely. Thus, it is not surprising that, in order to prepare such a supplemental pre-trial order, plaintiffs seek to amend and supplement the complaint.

Rule 15(a) Fed. R. Civ. P. provides that leave to amend shall be freely given when justice so requires. The general rule is that leave to amend will be granted unless the opposing party demonstrates that "immeasurable harm" or

"substantial prejudice" would result to it. See Strauss v. Douglas Aircraft Co. 404 F. 2d 1152, 1158 (2d Cir. 1968). Rule 15(d) permits supplemental pleadings, and leave to supplement is to be liberally granted where plaintiff simply seeks to assert that the same conduct has continued to date or that the conduct gives rise to different claims for relief related to those asserted in the original complaint. See Wright & Miller, Federal Practice and Procedure; Civil §1508 (1971). Further, when such a supplemental pleading is granted, the doctrine of relation back contained in Rule 15(c) Fed.R. Civ.P. permits the claim to relate back to the date of the filing of the complaint and thus avoid the effect of the governing statute of limitations. See Id.

"[W]hen a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and . . . a liberal rule should be applied." (New York Central & Hudson River R.R. v. Kinney, 260 U. S. 340, 346 (1922))

Against these general principles, defendants' protestations of surprise and prejudice are without merit. While the Court by no means condones plaintiffs' dilatory behavior in bringing this motion, it finds that defendants have raised no considerations which would require denying leave to amend and supplement.

Defendants' argument that plaintiffs' delay should bar this motion is clearly outweighed by the fact that, if plaintiffs are not allowed to amend, then the Court would have no statutory guide to plaintiffs' action. Indeed, it was for this very reason that the Court directed the preparation of a supplemental pre-trial order. Defendants' argument concerning the one-year limitation of liability under §36(b) misses the point. That section provides that a plaintiff

may not recover for any conduct occurring earlier than one year before the commencement of the action. Here, plaintiffs do not seek damages for a period earlier than one year before the original filing of the complaint; rather, plaintiffs seek to supplement the complaint simply to allege §36(b) liability for the period during which the action has been pending. Such supplemental pleadings are liberally allowed where, as here, the same conduct is said to have continued. Any limitations issue is defeated by the doctrine of relation back; see Rule 15(c).

On the addition of the §15(a) claim, defendants claim of prejudice is without merit. Plaintiffs seek only to assert that the same conduct originally complained of violated a different section of the same statutory scheme. This is not a case where the plaintiff seeks to shift from a fraud theory to an anti-trust theory, as in Johnson v. Sales Consultants, Inc., 61 F.R.D. 369 (N.D. Ill. 1973), or from a short-swing trading claim to a 10b-5 claim, as in Rogers v. Valentine, 426 F.2d 1361 (2d Cir. 1970).

Finally, defendants argue that the proposed amendments and supplementation will make the case too confusing because of the fact that the legal standards for the different time periods may vary in light of Congress' amendments to the acts in question. If this action were to be tried to a jury, such an argument might have some merit. However, the case will be tried to the Court, and the Court can apply the appropriate legal standards to measure defendants' conduct in the different time periods.

In sum, defendants do not claim that the proposed amendments and supplementation will require evidence now unavailable; they do not claim that the new claims will require different witnesses or any further discovery; and they do not claim that plaintiffs seek to proceed on any new set of facts. Accordingly, the Court finds no cognizable prejudice to the defendants and grants plaintiffs motion in all respects. Motion granted.

SO ORDERED.

Dated: New York, New York  
March 15, 1976

S/

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LAWRENCE W. PIERCE  
U. S. D. J.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x

CHARLES R. WOLFSON, RICHARD R. WOLFSON  
and LOUIS OKIN as Executors of the  
Estate of NATHANIEL C. WOLFSON, deceased,  
and HERBERT A. FUENTE,

Plaintiffs,

-against-

VERIFIED AMENDED  
AND SUPPLEMENTAL  
COMPLAINT

R. DOUGLASS COOPER, CHARLES FARNHAM,  
HARRY HAGEY, JR., LAWRENCE HICKEY,  
LEMUEL HUNTER, JOHN JEUCK, SYDNEY STEIN,  
JR., RICHARD TEMPLETON, HENRY THIELBAR,  
JOHN TITTLE, ROBERT WOODS, SR&F SERVICE  
CORPORATION, WACKER-ADAMS DATA SERVICE  
CORP., STEIN ROE & FARNHAM, STEIN ROE  
& FARNHAM STOCK FUND, INC., and STEIN  
ROE & FARNHAM BALANCED FUND, INC.,

72Civ.2238(LWP)

Defendants.

----- x

Plaintiffs by their attorneys, MARKEWICH ROSENTHAL  
MARKEWICH & FRIEDMAN, P.C., allege upon information and belief  
except for paragraphs "1", "2", "3" and "4" which are alleged upon  
knowledge:

ALLEGATIONS COMMON TO ALL COUNTS:

1. NATHANIEL C. WOLFSON, an owner of shares of  
STEIN ROE & FARNHAM STOCK FUND, INC. ("Stock Fund"), died on  
July 2, 1970 in the County, City and State of New York. Thereafter,  
letters testamentary were issued by the Surrogate of the  
County of New York, State of New York to plaintiffs, CHARLES R.  
WOLFSON, RICHARD R. WOLFSON and LOUIS OKIN, as Executors under  
the Last Will and Testament of NATHANIEL C. WOLFSON. Until his  
death, NATHANIEL C. WOLFSON owned the aforesaid shares of  
Stock Fund continuously; since his death, his Estate continued

to own and still owns such shares. The events and wrongs complained of herein occurred during the period of ownership of said shares by NATHANIEL C. WOLFSON and his Estate, which period was continuous and unbroken.

2. Plaintiff HERBERT A. FUENTE is and has been, continuously and at all times during the events and wrongs complained of herein, the owner of shares of defendant STEIN ROE & FARNHAM BALANCED FUND, INC. ("Balanced Fund").

3. Plaintiffs bring this action derivatively in behalf, in the right and for the benefit, jointly and severally, of Stock Fund and Balanced Fund.

4. This action is not collusive to confer on this Court jurisdiction it would not otherwise have.

5. Jurisdiction is based upon the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Exchange Act of 1934, the Securities Act of 1933, and the Rules and Regulations under each act.

6. At all relevant times, Stock Fund and Balanced Fund were each organized and existing under the laws of Maryland; were each registered under the Investment Company Act as an open-end investment company; and each had offices at 140 Broadway, County, City and State of New York.

7. (a). At the time of commencement of the action, defendants R. DOUGLASS COOPER, CHARLES WELLS FARNHAM, HARRY R. HAGEY, JR., LAWRENCE HICKEY, LEMUEL B. HUNTER, JOHN JEUCK, SYDNEY STEIN, JR., JOHN M. TITTLE and ROBERT A. WOODS were directors of both Stock Fund and Balanced Fund; defendants

RICHARD M. TEMPLETON and HENRY B. THIELBAR were directors of Stock Fund; and defendants REX JONES BATES and PHILIP SONDHEIMER were directors of Balanced Fund.

(b). At the time of commencement of this action, except for defendants Cooper, Hunter and Jeuck, the directors of both Funds are and have been co-partners in defendant STEIN ROE & FARNHAM ("Adviser"), an investment counselling partnership, with offices at 140 Broadway, County, City and State of New York.

8. At the instance of the Adviser, trades of securities for the Funds were invariably executed by and through brokers in the County, City and State of New York, and on, and pursuant to the rules of the New York and American Stock Exchanges.

9. Pursuant to management and advisory agreements separately entered into with each of the Funds (which were from time to time amended and renewed as amended, or renewed without amendment) the Adviser acted at all relevant times as the manager of and investment adviser to each Fund.

10. At all relevant times, the directors of each Fund had full investment discretion, but received and invariably followed investment advice from the Adviser.

11. For at least five years prior to commencement of this action, and until at least December 31, 1975, for the Adviser's managerial and advisory services, each Fund has separately paid the Adviser an annual fee of (a) one-half of one per cent (.05%) of the average net asset value of the respective Fund up to \$100,000,000. and (b) two fifths of one per cent (.04%)

of the average net asset value of the respective Fund in excess of \$100,000,000.

12. The bulk, by far, of the aforesaid fees was computed and paid at the higher rate of one-half of one per cent (.05%) of average net asset values of each of the respective funds. By design, only a minor portion of the aforesaid fees was computed and paid at the lower rate of two-fifths of one-percent (.04%) of the average net asset value of each of the respective Funds.

13. For at least five years prior to commencement of this action, and until at least December 31, 1975, Stock Fund and Balanced Fund have each been caused to pay its fees to the Adviser without accounting for the fact that the Adviser was receiving fees comparable in amount and identical in basis from the other Fund for undifferentiated, identical and simultaneously executed managerial services and investment advice. Yet, despite the community of operations and identity of holdings of Stock Fund and Balanced Fund, the fees paid to the Adviser have been separately computed upon the net asset value of each Fund rather than upon the aggregate net asset value of both Funds.

14. By reason of investment portfolios, policies and objectives which have been (except for certain bond holdings in Balanced Fund) virtually identical, and by reason of the common personnel, operations and services, the two Funds have in reality been coordinate halves of one open-end investment company, whose net asset values, earnings, gains and losses have consequently moved in tandem over the years.

15. The defendants' sole purpose in artificially maintaining the separate existence of Stock Fund and Balanced Fund has been the unjust enrichment of the defendant Adviser and the defendant individuals resulting from the separate imposition of the higher fee rates on the first \$100,000,000. of net asset values in each Fund.

16. Demand upon the directors of Stock Fund and Balanced Fund to bring this action would be futile because it would be tantamount to a demand that they sue themselves. Said directors have long known of, profited from, participated in, tolerated, condoned and approved with knowledge the acts, omissions and misrepresentations complained of, and are personally liable therefor. Moreover, if suit were commenced by them, control thereof would be in the hands of the wrongdoers, thereby preventing proper prosecution, and such suit would be inherently collusive

17. Demand upon shareholders of Stock Fund and Balanced Fund to bring this action is unnecessary and would be futile because (a) the wrongs alleged cannot be ratified; (b) any shareholder resolution to bring suit would be both futile and an encouragement to collusion, since it would place the action under supervision of the wrongdoers and would prevent proper prosecution; (c) such demand would cause intolerable financial burden to plaintiffs in that consents would have to be solicited from thousands of diversely located shareholders; (d) such demand would result in undue delay and prejudice to plaintiffs, Stock Fund and Balanced Fund; (e) such demand would invite the risk of relevant statutes of limitations

or laches; and (f) the shareholders are so numerous as to make it impracticable to bring them all before the Court.

18. Plaintiffs have no adequate remedy at law.

FIRST COUNT

19. Until June 14, 1972, the excess payments of fees resulting from defendants' separate maintenance of the two funds and defendants' refusal to aggregate the two funds, at least for fee purposes, constituted unlawful and willful conversion, gift, waste and spoliation of the assets of Stock Fund and Balanced Fund, gross abuse of trust, gross misconduct, willful misfeasance, bad faith, gross negligence or reckless disregard of official duties, and breach of the Adviser's separate fiduciary duty to each Fund and each Fund's shareholders, all in violation of §37, and former §36 of the Investment Company Act, common law and principles of equity, and for all of which the individual defendants and the defendant Adviser have failed to account to the Funds, the plaintiffs and all shareholders of the Funds.

20. (a) On December 31, 1967, the net asset value of Stock Fund was \$84,410,567.; its investment portfolio consisted of 57 common stock issues having a market or net asset value of \$75,702,624., 3 issues of preferred stock and long-term obligations having a market or net asset value of \$3,896,000., in addition to \$4,311,943. of cash and cash equivalent; on said date the net asset value of Balanced Fund was \$149,911,944.; its investment portfolio consisted of 52 common stock issues having a market or net asset value of \$102,351,270., 28 issues of Preferred stock and long-term

obligations having a market or net asset value of \$30,663,320., in addition to \$16,897,354. of cash and cash equivalent.

(b) On December 31, 1968, the net asset value of Stock Fund was \$114,383,397.; its investment portfolio consisted of 56 common stock issues having a market or net asset value of \$97,105,065., 4 issues of preferred stock and long-term obligations having a market or net asset value of \$9,775,000., in addition to \$7,503,332. of cash and cash equivalent; on said date the net asset value of Balanced Fund was \$175,807,650.; its investment portfolio consisted of 59 common stock issues having a market or net asset value of \$118,901,993., 30 issues of Preferred stock and long-term obligations having a market or net asset value of \$47,098,726., in addition to \$9,806,931. of cash and cash equivalent.

(c) On December 31, 1969, the net asset value of Stock Fund was \$124,713,955.; its investment portfolio consisted of 55 common stock issues having a market or net asset value of \$108,036,200., 5 issues of preferred stock and long-term obligations having a market or net asset value of \$2,273,500., in addition to \$8,404,255. of cash and cash equivalent; on said date the net asset value of Balanced Fund was \$163,978,057.; its investment portfolio consisted of 54 common stock issues having a market or net asset value of \$113,553,762., 37 issues of Preferred stock and long-term obligations having a market or net asset value of \$45,218,750., in addition to \$5,205,545. of cash and cash equivalent.

(d) On December 31, 1970, the net asset value of Stock Fund was \$126,851,349.; its investment portfolio consisted of 51 common stock issues having a market or net asset value of \$116,809,383., 5 issues of preferred stock and long-term obligations having a market or net asset value of \$6,828,450., in addition to \$3,214,011. of cash and cash equivalent; on said date the net asset value of Balanced Fund was \$153,673,395.; its investment portfolio consisted of 48 common stock issues having a market or net asset value of \$114,946,187., 33 issues of preferred stock and long-term obligations having a market or net asset value of \$37,277,658., in addition to \$1,449,550. of cash and cash equivalent.

(e) On December 31, 1971, the net asset value of Stock Fund was \$159,316,496.; its investment portfolio consisted of 51 common stock issues having a market or net asset value of \$116,809,388., 5 issues of preferred stock and long-term obligations having a market or net asset value of \$6,828,450., in addition to \$3,214,011. of cash and cash equivalent; on said date the net asset value of Balanced Fund was \$180,026,104.; its investment portfolio consisted of 48 common stock issues having a market or net asset value of \$114,946,187., 33 issues of preferred stock and long-term obligations having a market or net asset value of \$37,277,658., in addition to \$1,449,550. of cash and cash equivalent.

21. (a) As of December 31, 1967, of the 60 common stock issues and issues of preferred stock and long-term obligations in Stock Fund and of the 80 common stock

issues and issues of preferred stock and long-term obligations in Balanced Fund, the same 48 issues were held by each fund. The value of these twin holdings was \$69,427,124., i.e. 87.22% of Stock Fund's total holdings of all securities, and \$99,703,395., i.e. 74.96% of Balanced Fund's total holdings of all securities as of that date.

(b) As of December 31, 1968, of the 60 common stock issues and issues of preferred stock and long-term obligations in Stock Fund and of the 89 common stock issues and issues of preferred stock and long-term obligations in Balanced Fund, the same 52 issues were held by each fund. The value of these twin holdings was \$96,685,977., i.e. 90.46%, of Stock Fund's total holdings of all securities, and \$116,381,805., i.e. 70.11% of Balanced Fund's total holdings of all securities as of that date.

(c) As of December 31, 1969, of the 60 common stock issues and issues of preferred stock and long-term obligations in Stock Fund and of the 91 common stock issues and issues of preferred stock and long-term obligations in Balanced Fund, the same 53 issues were held by each fund. The value of these twin holdings was \$106,555,475., i.e. 91.61%, of Stock Fund's total holdings of all securities, and \$114,654,262., i.e. 72.21% of Balanced Fund's total holdings of all securities as of that date.

(d) As of December 31, 1970, of the 56 common stock issues and issues of preferred stock and long-term obligations in Stock Fund and of the 81 common stock issues and issues of preferred stock and long-term obligations in Balanced Fund, the same 48 issues were held by each fund. The value of these

twin holdings was \$111,632,333., i.e. 90.29%, of Stock Fund's total holdings of all securities, and \$114,400,250., i.e. 75.15%, of Balanced Fund's total holdings of all securities as of that date.

(e) As of December 31, 1971, of the 61 common stock issues and issues of preferred stock and long-term obligations in Stock Fund and of the 78 common stock issues and issues of preferred stock and long-term obligations in Balanced Fund, the same 48 issues were held by each fund. The value of these twin holdings was \$134,592,050., i.e. 37.77%, of Stock Fund's total holdings of all securities, and \$126,624,837., i.e. 74.45% of Balanced Fund's total holdings of all securities as of that date.

22. (a) As of December 31, 1967, of the 57 common stock issues in Stock Fund and of the 52 common stock issues in Balanced Fund, the same 45 issues were held by each fund. The value of these twin holdings was \$65,531,124., i.e., 86.56%, of Stock Fund's entire common stock portfolio, and \$94,563,895., i.e. 92.39% of Balanced Fund's entire common stock portfolio as of that date.

(b) As of December 31, 1968, of the 56 common stock issues in Stock Fund and of the 59 common stock issues in Balanced Fund, the same 48 issues were held by each fund. The value of these twin holdings was \$86,910,977., i.e. 89.50%, of Stock Fund's entire common stock portfolio, and \$102,351,305., i.e. 86.08%, of Balanced Fund's entire common stock portfolio as of that date.

(c) As of December 31, 1969; of the 55 common stock

issues in Stock Fund and of the 54 common stock issues in Balanced Fund, the same 48 issues were held by each fund. The value of these twin holdings was \$98,281,975., i.e. 90.97%, of Stock Fund's entire common stock portfolio, and \$105,830,262., i.e. 93.20%, of Balanced Fund's entire common stock portfolio as of that date.

(d) As of December 31, 1970, of the 51 common stock issues in Stock Fund and of the 48 common stock issues in Balanced Fund, the same 43 issues were held by each fund. The value of these twin holdings was \$15,371,388., i.e. 90.21%, of Stock Fund's entire common stock portfolio, and \$108,012,062., i.e. 93.97%, of Balanced Fund's entire common stock portfolio as of that date.

(e) As of December 31, 1971, of the 53 common stock issues in Stock Fund and of the 51 common stock issues in Balanced Fund, the same 45 issues were held by each fund. The value of these twin holdings was \$126,694,050., i.e. 87.11%, of Stock Fund's entire common stock portfolio, and \$117,870,837., i.e. 88.71%, of Balanced Fund's entire common stock portfolio as of that date.

23. At all relevant times herein, the Adviser further maintained the identity of the two funds by buying or selling for each fund shares of the same issues within each fiscal year. In 1969, 8 issues which were held by neither fund, on December 31, 1968, were acquired by each fund, 6 in identical amounts for each fund,. In the same year, 11 issues which were held by both funds on December 31, 1968, were eliminated

from each Fund. In 1970, 12 issues which were held by neither Fund on December 31, 1969, were acquired by each Fund, 8 in identical amounts for each Fund. In the same year, 20 issues which were held by both Funds on December 31, 1969, were eliminated from each Fund. In 1971, 15 issues which were held by neither fund on December 31, 1970, were acquired by each Fund, 9 in identical amounts for each fund. In the same year, 13 issues which were held by both funds on December 31, 1970, were eliminated from each Fund. All or most of said purchases and sales for the account of each fund were aggregated in single or tandem transactions by the Adviser.

24. At all relevant times herein, the Adviser further maintained the identity of the two funds by buying or selling for each fund matched amounts or amounts within 5% of each other of the same issues within each fiscal year. As of December 31, 1969, there were 14 such matched issues in each fund. As of December 31, 1970, there were 21 such matched issues in each fund. As of December 31, 1971, there were 22 such matched issues in each fund. All or most of said purchases and sales for the account of each fund were aggregated in single or tandem transactions by the Adviser.

25. For 1971, the fee paid by Stock Fund was \$686,536., and the fee paid by Balanced Fund was \$779,378. For 1970, the fee paid by Stock Fund was \$553,324., and the fee paid by Balanced Fund was \$674,012. For 1969, the fee paid by Stock Fund was \$571,863., and the fee paid by Balanced Fund was \$767,363.

For 1968 the fee paid by Stock Fund was \$476,314., and the fee paid by Balanced Fund was \$737,593. For 1967 the fee paid by Stock Fund was \$368,121 and the fee paid by Balanced Fund was \$633,499.

26. Had the assets of Stock Fund and Balanced Fund been aggregated into one fund, or treated as aggregated for the purposes of the advisory fee, the fees paid to Adviser in 1971, 1970 and 1969 would have been \$100,000. less than the fees actually paid by both Funds in said years. The fees paid to Adviser in 1968 would have been, \$95,000. less than the fees actually paid by both Funds in said years; and the fee paid in 1967 would have been \$75,000. less. The total of excess payments constituting unjust enrichment was, for the five years preceding commencement of this action, approximately \$470,000., all at the expense of both Funds and their shareholders.

SECOND COUNT:

27. Commencing June 14, 1972, the Adviser and the individual defendants have been in continuous breach of their fiduciary duties under §36(b) of the Investment Company Act relating to compensation of investment advisers, in that they have been separately maintaining the two Funds and refusing to aggregate them, at least for fee purposes, solely in order to exact excess payments of fees from the two Funds, for all of which the Advisers and the individual defendants have failed to account to the Funds, the plaintiffs and all shareholders of the Fund.

28. (a) On December 31, 1972, the net asset value of Stock Fund was \$202,053,770.; its investment portfolio consisted of 62 common stock issues having a market or net asset value of \$183,600,731., 1 long-term obligation issue having a market or net asset value of \$4,540,000., in addition to \$13,913,039. of cash and cash equivalent; on said date the net asset value of Balanced Fund was \$208,763,128.; its investment portfolio consisted of 53 common stock issues having a market or net asset value of \$152,623,463., 22 issues of preferred stock and long-term obligations having a market or net asset value of \$28,382,122., in addition to \$27,762,543. of cash and cash equivalent.

(b) On December 31, 1973, the net asset value of Stock Fund was \$171,914,240.; its investment portfolio consisted of 65 common stock issues having a market or net asset value of \$158,271,629, in addition to \$13,642,611 of cash and cash equivalent; on said date the net asset value of Balanced Fund was \$166,944,078 ; its investment portfolio consisted of 52 common stock issues having a market or net asset value of \$118,951,116., 30 issues of preferred stock and long-term obligations having a market or net asset value of \$37,212,469., in addition to \$10,780,493. of cash and cash equivalent.

(c) On December 31, 1974, the net asset value of Stock Fund was \$121,960,596.; its investment portfolio consisted of 60 common stock issues having a market or net asset value of \$106,577,549., in addition to \$15,383,047. of cash and cash equivalent; on said date the net asset value of

Balanced Fund was \$113,203,269.; its investment portfolio consisted of 49 common stock issues having a market or net asset value of \$81,764,010., 28 issues of preferred stock and long-term obligations having a market or net asset value of \$25,667,124., in addition to \$5,772,135. of cash and cash equivalent.

(d) On December 31, 1975, the net asset value of Stock Fund was \$163,228,496.; its investment portfolio consisted of 67 common stock issues having a market or net asset value of \$156,787,682, no issues of preferred stock and long-term obligations, in addition to \$6,440,814. of cash and cash equivalent; on said date the net asset value of Balanced Fund was \$137,390,057; its investment portfolio consisted of 50 common stock issues having a market or net asset value of \$100,723,590., 26 issues of preferred stock and long-term obligations having a market or net asset value of \$29,598,554, in addition to \$7,067,913 of cash and cash equivalent.

29. (a) As of December 31, 1972, of the 63 common stock issues and issues of preferred stock and long-term obligations in Stock Fund and of the 75 common stock issues and issues of preferred stock and long-term obligations in Balanced Fund, the same 47 issues were held by each fund. The value of these twin holdings was \$159,849,888., i.e. 84,96%, of Stock Fund's total holdings of all securities, and \$145,345,463., i.e. 80.30%, of Balanced Fund's total holdings of all securities as of that date.

(b) As of December 31, 1973, of the 65

common stock issues and issues of preferred stock and long-term obligations in Stock Fund and of the 85 common stock issues and issues of preferred stock and long-term obligations in Balanced Fund, the same 50 issues were held by each fund. The value of these twin holdings was \$137,822,716., i.e. 87.03%, of Stock Fund's total holdings of all securities, and \$117,922,554., i.e. 75.51%, of Balanced Fund's total holdings of all securities as of that date.

(c) As of December 31, 1974, of the 60 common stock issues and issues of preferred stock and long-term obligations in Stock Fund and of the 77 common stock issues and issues of preferred stock and long-term obligations in Balanced Fund, the same 46 issues were held by each fund. The value of these twin holdings was \$92,392,899., i.e. 86.69%, of Stock Fund's total holdings of all securities, and \$78,915,260., i.e. 73.46%, of Balanced Fund's total holdings of all securities as of that date.

(d) As of December 31, 1975, of the 67 common stock issues and issues of preferred stock and long-term obligations in Stock Fund and of the 76 common stock issues and issues of preferred stock and long-term obligations in Balanced Fund, the same 46 issues were held by each fund. The value of these twin holdings was \$125,739,300, i.e. 80.20%, of Stock Fund's total holdings of all securities, and \$97,539,840, i.e. 74.85%, of Balanced Fund's total holdings of all securities as of that date.

30. (a) As of December 31, 1972; of the 62 common stock issues in Stock Fund and of the 653 common stock issues in Balanced Fund, the same 46 issues were held by each fund. The value of these twin holdings was \$153,300,888., i.e. 84.59%, of Stock Fund's entire common stock portfolio, and \$143,845,463., i.e. 94.25%, of Balanced Fund's entire common stock portfolio as of that date.

(b) As of December 31, 1973; of the 65 common stock issues in Stock Fund and of the 52 common stock issues in Balanced Fund, the same 50 issues were held by each fund. The value of these twin holdings was \$137,822,716., i.e. 87.08%, of Stock Fund's entire common stock portfolio, and \$117,922,554., i.e. 99.14%, of Balanced Fund's entire common stock portfolio as of that date.

(c) As of December 31, 1974; of the 60 common stock issues in Stock Fund and of the 49 common stock issues in Balanced Fund, the same 46 issues were held by each fund. The value of these twin holdings was \$92,392,899., i.e. 86.69%, of Stock Fund's entire common stock portfolio, and \$78,915,260., i.e. 96.52%, of Balanced Fund's entire common stock portfolio as of that date.

(d) As of December 31, 1975; of the 67 common stock issues in Stock Fund and of the 50 common stock issues in Balanced Fund, the same 46 issues were held by each fund. The value of these twin holdings was \$125,739,300, i.e. 80.20%, of Stock Fund's entire common stock portfolio, and \$97,539,840, i.e. 96.84%, of Balanced Fund's entire common stock portfolio as of that date.

31. At all relevant times herein, the Adviser further maintained the identity of the two funds by buying or selling for each fund shares of the same issues within each fiscal year. In 1972, 17 issues which were held by neither fund, on December 31, 1971, were acquired by each fund, 12 in identical amounts for each fund. In the same year, 14 issues which were held by both funds on December 31, 1971, were eliminated from each Fund. In 1973, 12 issues which were held by neither Fund on December 31, 1972, were acquired by each Fund, 7 in identical amounts for each Fund. In the same year, 9 issues which were held by both Funds on December 31, 1972, were eliminated from each Fund. All or most of said purchases and sales for the account of each fund were aggregated in single or tandem transactions by the Adviser.

32. At all relevant times herein, the Adviser further maintained the identity of the two funds by buying or selling for each fund matched amounts or amounts within 5% of each other of the same issues within each fiscal year. As of December 31, 1972, there were 22 such matched issues in each fund. As of December 31, 1973, there were 21 such matched issues in each fund. As of December 31, 1974, there were 41 such matched issues in each fund. As of December 31, 1975, there were 9 such matched issues in each fund. All or most of said purchases and sales for the account of each fund were aggregated in single or tandem transactions by the Adviser.

33. For 1972, the fee paid by Stock Fund was \$844,095. and the fee paid by Balanced Fund was \$898,911. For 1973, the fee

paid by Stock Fund was \$830,120. and the fee paid by Balanced Fund was \$829,773. For 1974, the fee paid by Stock Fund was \$652,283. and the fee paid by Balanced Fund was \$626,235. For 1975, the fee paid by Stock Fund was \$741,233 and the fee paid by Balanced Fund was \$653,309.

34. Had the assets of Stock Fund and Balanced Fund been aggregated into one fund, or at least treated as aggregated for the purpose of the advisory fee, the fee paid to Adviser in 1972, 1973, 1974 and 1975 by both Funds would have been \$100,000. less than the actual fees paid by both Funds, in each of those years, or a total of \$400,000. for said four years.

THIRD COUNT:

35. The Investment Advisory contracts of each Fund and the Adviser were approved annually by a vote of directors of the respective Fund.

36. In approving the Advisory contracts applicable through June 13, 1972, the directors failed to exercise the fiduciary duties established by the Investment Company Act, as it then stood, common law and principles of equity, in that they failed to protect the assets of the respective Funds from waste, looting and spoliation by the Adviser, which charges fees that were excessive and failed to take into account the identity of advice to and services for the other Fund.

37. In approving advisory contracts applicable on and after June 14, 1972, the directors breached the fiduciary duty cast upon them by §36(b) of the Investment Company Act, common law and principles of equity, in that they failed to protect the net assets of the respective Funds from waste by the Advisor, which charged fees that were excessive and did not take into account the identity of advice to and services for the other Fund.

FOURTH COUNT:

38. For at least six years prior to the commencement of this action and until December 31, 1975, the Adviser, by making recommendations to the directors of each Fund so as to insure its replication of the other Fund, has engaged in a fraudulent practice in contravention of §206 of the Investment Advisers Act.

39. Under §206 of the Investment Advisers Act, common law and principles of equity, the Adviser was under a duty to advise each Fund either to merge with the other so as to reduce advisory fees, thereby increasing assets and income for the shareholders of each Fund, or at least to advise that the assets of both Funds be aggregated for the limited purpose of fee computation.

FIFTH COUNT:

40. For at least six years prior to the commencement of the action and at least until December 31, 1975, the Adviser acted unlawfully with respect to each Fund, in that, in

violation of §15(a) of the Investment Company Act (both as it stood before and after December 31, 1971), the Adviser's written contract with each Fund failed to prescribe precisely all compensation to be paid to the Adviser thereunder, in that neither contract informed the stockholders of the respective Fund that the Adviser was being doubly compensated by the other Fund for precisely the same services, without any additional effort, time or expense whatsoever.

SIXTH COUNT:

41. Proxy statements of Stock Fund and Balanced Fund, which must conform to statutory provisions, have been mailed annually to shareholders in connection with annual meetings of the respective funds. Said proxy statements and proxy machinery have been entirely under the control of the Adviser and the individual defendants.

42. For at least six years prior to the commencement of the action, said proxy material has failed, as to each Fund, to disclose that the respective advisory contract permitted and concealed the collection of excessive fees, waste and spoliation of the net assets of each Fund, by providing for a fee at a rate predicated on the real and actual existence of two separate Funds having more than \$100,000,000. each in net asset value; the aforesaid proxy statements have also failed to state, with respect to each proposed renewal or amendment of the advisory contract, the material fact that significant savings of the advisory fee could be and should have been realized, all in violation of §§206 and 207 of the Investment Adviser's Act.

43. By reason of the aforesaid deceptive practices, the shareholders of the respective Funds, segregated from each other, were effectively prevented from taking affirmative action to protect the respective Funds at the annual shareholders' meetings, were effectively prevented from submitting corrective resolution to be acted upon for the protection of the respective Funds; and were effectively induced to rely upon, vote for and deliver their proxies to the defendants who consistently mailed them; all of which left the Funds shorn of effective protection.

SEVENTH COUNT:

44. Through 1971, defendant SR&F SERVICE CORPORATION ("WRF") acted as transfer agent for both Stock Fund and Balanced Fund. For these services each Fund and the Adviser have paid fees to SRF.

45. In 1971, SRF was supplanted by defendant WACKER-ADAMS DATA SERVICE CORP. ("Wacker-Adams").

46. Both SRF and Wacker-Adams are and have been owned by the individual defendants who are and have been partners of STEIN ROE & FARNHAM.

47. The prospectus of Stock Fund and Balanced Fund have each stated that each Fund's respective annual payments to the transfer agent have been less than the costs incurred by said agent in performing its services. Each prospectus, however, has failed to state the material fact that, in large part, the services to each Fund were, in fact and in truth, the same service to both Funds, and that the aggregate of payments from both Funds exceeded, and will continue to exceed, the aggregate of costs incurred.

WHEREFORE, plaintiffs demand judgment against defendants:

(a) requiring that defendants, (other than Stock Fund and Balanced Fund) jointly and severally account to Stock Fund and Balanced Fund for damages to Stock Fund and Balanced Fund as a result of the acts, omissions and misrepresentations complained of, and for any and all profits and other emoluments derived directly or indirectly by said defendants;

(b) restraining and enjoining defendants (other than the Funds) and each of them, their servants, employees and agents, from continuing the acts, omissions and misrepresentations complained of;

(c) restraining and enjoining defendants (other than the Funds) from continuing in effect and operation the investment advisory agreements between Stock Fund and the Adviser and between Balanced Fund and the Adviser;

(d) awarding plaintiffs the costs and disbursements of this action, including reasonable attorneys' and accountants' fees; and

(e) granting plaintiffs such other and further relief as may be just and proper.

MARKEWICH ROSENHAUS MARKEWICH & FRIEDMAN

By: 

A Member of the Firm  
Attorneys for Plaintiffs  
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New York, N. Y. 10001  
563-3500

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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CHARLES R. WOLFSON, RICHARD R. WOLFSON	:	
and LOUIS OKIN as Executors of the	:	
Estate of NATHANIEL C. WOLFSON, deceased,	:	
and HERBERT A. FUENTE,	:	
	:	72 Civ. 2238 (LWP)
Plaintiffs,	:	
	:	<u>PRE-TRIAL ORDER</u>
-against-	:	
	:	
R. DOUGLASS COOPER, CHARLES FARNHAM,	:	Non-Jury Calendar
HARRY HAGEY, JR., LAWRENCE HICKEY,	:	
LEMUEL HUNTER, JOHN JEUCK, SYDNEY STEIN,	:	
JR., RICHARD TEMPLETON, HENRY THIELBAR,	:	
JOHN TITTLE, ROBERT WOODS, SR&F SERVICE	:	
CORPORATION, WACKER-ADAMS DATA SERVICE	:	
CORP., STEIN ROE & FARNHAM, STEIN ROE &	:	
FARNHAM STOCK FUND, INC., and STEIN ROE	:	
& FARNHAM BALANCED FUND, INC.,	:	
	:	
Defendants.	:	

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On May 22, 1975 the parties to this action or their attorneys appeared before the Court at a pre-trial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure and the following action was taken:

1. No change in the pleadings has been requested by either side.
2. The parties agreed that the trial of this action should be based upon this order and upon the pleadings; no issues have been abandoned by either side.
3. (a) The parties stipulated that the following facts are not in dispute in this action (each party reserving the right to object to the materiality of any such stipulated fact and its relevancy to the issues):

(i) Stein Roe & Farnham Balanced Fund, Inc.

("Balanced Fund") is a corporation organized on August 25, 1949 and currently existing under the laws of the State

of Maryland. Balanced Fund is a diversified open-end management investment company, as those terms are defined in 15 U.S.C. § 80a-1, et seq., and is so registered with the SEC.

(ii) Stein Roe & Farnham Stock Fund, Inc. ("Stock Fund") is a corporation organized on April 15, 1958 and currently existing under the laws of the State of Maryland. Stock Fund is a diversified open-end management investment company, as those terms are defined in 15 U.S.C. § 80a-1, et seq., and is so registered with the SEC.

(iii) The older fund, Balanced Fund, was organized with the investment objective of providing a diversified portfolio of securities, of which approximately 25% were normally to be and have normally been long-term debt securities.

(iv) The newer fund, Stock Fund, was organized with the investment objective of <sup>providing</sup> a diversified portfolio of securities, substantially all of which were normally to be common stock and other equity type securities. Since its organization the assets of Stock Fund have in fact been invested substantially in common stock and other equity type securities, except for cash reserves necessary for the redemption of shares and the transaction of other business of the Fund. Also included in cash reserves from time to time are funds held pending reinvestment in common stock.

(v) Each Fund has its only office at 150 South Wacker Drive, Chicago, Illinois 60606.

(vi) Stein Roe & Farnham maintains an office at 140 Broadway, New York, New York 10005.

(vii) As of December 31, 1971 defendant Thielbar was a director of Stock Fund.

(viii) As of December 31, 1971 R. Douglass Cooper, Charles Farnham, Harry Hagey, Jr., Lawrence Hickey, Lemuel Hunter, John Jeuck, Sydney Stein, Jr., John Tittle and Robert A. Woods were directors of both Balanced Fund and Stock Fund.

(ix) As of December 31, 1971 Rex James Bates and James Sondheimer were directors of Balanced Fund. Mr. Bates resigned as a director of Balanced Fund effective March 31, 1972.

(x) As of December 31, 1971 Richard Templeton was a director of Stock Fund.

(xi) Defendants Stein Roe & Farnham is an Illinois limited partnership. It is an investment adviser. The individual defendants except defendants Bates, Cooper, Hunter and Jeuck are partners in Stein Roe & Farnham. Messrs. Bates, Cooper, Hunter and Jeuck are neither "affiliated" nor "interested persons" within the meaning of §§ 2a(3), 2a(19), 10(a) and 10(b) of the Investment Company Act.

(xii) Stein Roe & Farnham furnishes continuous investment supervision to each fund and for its services receives, and has received since February 23, 1968 in the case of Stock Fund and since February 20, 1962 in the case of Balanced Fund, a quarterly fee, set by each fund's investment advisory contract, of one eighth of 1% of the net asset value of each fund up to \$100,000,000 as determined by valuations at the close of each month in the quarterly period, which fee is reduced to one

tenth of 1% of the net asset value of each fund in excess of \$100,000,000.

(xiii) Fees paid to Stein Roe & Farnham by each fund were and are computed in accordance with the terms of each fund's investment advisory contract then in effect.

(xiv) On December 31, 1971 the portfolio of Stock Fund consisted of 61 issues of common stock and convertible securities for a market value of \$153,346,175 and four issues of short term debt obligations having a market value of \$3,069,137. The portfolio of Balanced Fund contained 52 issues of common stock having a market value of \$132,878,337, 26 issues of long term debt obligations having a market value of \$36,407,987, five issues of short term debt obligations having a market value of \$6,355,749 and one issue of preferred stock having a market value of \$799,000.

(xv) Of the 65 issues held by Stock Fund on December 31, 1971 and of the 84 issues held by Balanced Fund on that date, 48 issues, excluding cash equivalents, were held by both funds. The market value of the securities of these 48 issues held by Stock Fund was \$134,592,050 (86% of total investments) and the market value of the securities of these 48 issues held by the Balanced Fund was \$125,342,337 (71% of total investments).

(xvi) Of the 60 issues held by Stock Fund on December 31, 1970 and the 82 issues held by Balanced Fund, 47 issues, excluding cash equivalents, were held by both funds. The market value of the securities of these 47 issues held by Stock

Fund was \$111,632,338 (89% of total investments) and the market value of the securities of these 47 issues held by Balanced Fund was \$114,400,250 (75% of total investments).

(xvii) Of the 61 issues of common stocks and convertible securities held by Stock Fund on December 31, 1971 and of the 58 issues of common stocks and convertible securities held by Balanced Fund on December 31, 1971, 48 issues were held by both funds. The market value of the shares of these 48 issues held by Stock Fund was \$134,592,050 (88% of the market value of the Stock Fund's common stocks and convertible securities) and the market value of the shares of these 48 shares held by Balanced Fund was \$125,342,337 (87% of the market value of the Balanced Fund's common stocks and convertible securities).

(xviii) Of the 56 issues of common stocks and convertible securities held by Stock Fund on December 31, 1970 and of the 55 issues of common stocks and convertible securities held by Balanced Fund on December 31, 1970, 47 issues were held by both funds. The market value of the shares of these 47 issues held by Stock Fund was \$111,632,338 (89% of the market value of Stock Fund's common stocks and convertible securities) and the market value of these 47 issues held by Balanced Fund was \$114,400,250 (94% of the market value of Balanced Fund's common stocks and convertible securities).

(xvix) On December 31, 1971 the funds held identical amounts of securities of 20 issues of common stocks and convertible securities and on December 31, 1970 the funds held identical amounts of securities of 21 issues.

(xx) In 1971 seven of the 21 issues of common stocks and convertible securities held in identical amounts by the funds on December 31, 1970 were eliminated from the portfolios of both funds, and one of these 21 issues was eliminated from the portfolio of Balanced Fund.

(xxi) On December 31, 1971 Stock Fund held 25 issues of common stocks and convertible securities which it had not held on December 31, 1970 and Balanced Fund held 24 issues of common stocks and convertible securities which it had not held on December 31, 1970. Of these 25 issues held by Stock Fund and 24 issues held by Balanced Fund, 17 issues were held by both funds and 10 of these 17 issues were held in identical amounts by both funds.

(xxii) The investment advisory contracts of the funds have been approved, during the period in question, as required by law by votes of a majority of the outstanding voting securities of each fund or by votes of their boards of directors in compliance with the applicable statute. At the annual meeting of shareholders of Stock Fund, held February 23, 1968, 3,781,912 shares, constituting a majority of the outstanding voting securities of the Fund, approved the investment advisory contract, with 8,292 shares voting against approval. At the annual meeting of shareholders of Balanced Fund, held February 28, 1969, 5,096,640 shares, constituting a majority of the outstanding voting securities of the Fund, approved the investment advisory contract, with 20,568 shares voting against approval. At the annual

meeting of shareholders of Stock Fund, held June 16, 1972, 7,091,379 shares, constituting a majority of the outstanding voting securities of the Fund, approved the investment advisory contract with 183,550 shares voting against approval. At the annual meeting of shareholders of Balanced Fund, held June 16, 1972, 5,249,060 shares, constituting a majority of the outstanding voting securities of the Fund, approved the investment advisory contract with 114,294 shares voting against approval. Since 1970 the funds' investment advisory contracts have been approved at periodic intervals by the vote of holders of a majority of the outstanding securities of each fund or by a majority of those directors who are not "interested persons" (as that term is defined in the Act) of the funds or of Stein Roe & Farnham, voting in person at a meeting called for that purpose. The boards of directors of both funds have been provided "expense studies" showing the expenses and net income or loss to Stein Roe & Farnham of managing the funds. These expense studies were annually considered by the directors of each Fund prior to their voting on the investment advisory contract for that fund.

(xxiii) Proxy statements have been mailed to each fund's shareholders in connection with each fund's annual meeting in conformance with applicable provisions of the Act and the Rules and Regulations promulgated thereunder.

(xxiv) On November 1, 1969 SR&F Service Corporation became the agent for transfer of shares, disbursement of dividends and maintenance of shareholder accounting records for Stock Fund and, on April 1, 1970, agent for

the same purposes for Balanced Fund, serving as such agent for both funds until August 26, 1971. Stein Roe & Farnham and both funds paid fees to SR&F Service Corporation for its services as such agent for the funds.

(xxv) On August 27, 1971 the name of SR&F Service Corporation was changed to Wacker-Adams Data Service Corporation and since that date Wacker-Adams Data Service Corporation has served as such agent for both funds.

(xxvi) The individual defendants who are and have been partners in Stein Roe & Farnham each owned and presently owns shares of stock in Wacker-Adams Data Service Corporation, formerly named SR&F Service Corporation.

(xxvii) In 1971 and 1972 each fund's annual payment to Wacker-Adams Data Service Corporation (formerly named SR&F Service Corporation) has been less than the costs incurred by it in performing its services for each Fund and the prospectuses for both funds in 1971 and 1972 so state.

3. (b) Plaintiffs' contentions as to liability and damages are as follows:

(i) Jurisdiction is based upon The Investment Company Act of 1940, the Investment Advisors Act of 1940, the Securities Exchange Act of 1934, the Securities Act of 1933, and the Rules and Regulations under each Act.

(ia) The plaintiffs' ownership of stock in Stock Fund and Balanced Fund is as set forth in the complaint.

(ii) At the insistence of the Advisor trades of securities for the funds were almost invariably

executed by and through brokers in the County, City and State of New York and on and pursuant to the rules of the New York and American Stock Exchanges.

(iii) At all relevant times the directors of each fund had full investment discretion but received and invariably followed investment advice from the Adviser.

(iv) For at least six years prior to the commencement of this action Stock Fund and Balanced Fund have each been caused to pay fees to the Adviser without accounting for the fact that the Adviser was receiving fees comparable in amount and identical in basis from the other fund for undifferentiated, identical and simultaneously executed managerial services and investment advice.

(v) Despite the community of operations and identity of holdings of Stock Fund and Balanced Fund, the fees paid to the Adviser have been separately computed upon the net asset value of each fund rather than upon the aggregate net value of both funds.

(vi) By reason of investment portfolios, policies and objectives which have been virtually identical, except for certain bond holdings in Balanced Fund, and by reason of the common personnel, operations and services, the two funds have in reality been coordinate halves of one open-end investment company whose net asset values, earnings and losses moved in tandem over the years.

(vii) The defendants' purpose in artificially maintaining the separate existence of the two funds has

been the unjust enrichment of the defendant Adviser and the defendant individuals resulting from the separate imposition of the higher fee rates on the first \$100,000,000 of asset values in each fund.

(viii) In the years 1966, 1967, 1968 and 1969, the ratios of twin holdings to total holdings of each fund were approximately the same as in 1970 and 1971, generally following the pattern that twin holdings amounted to about 75% of the common stock portfolio of each fund.

(ix) It would have been futile to demand that the directors of the funds bring this action.

(x) It was unnecessary and it would be futile to make demand upon shareholders of the funds to bring this action.

(xi) Plaintiffs have no adequate remedy at law.

(xii) The excess payment of fees resulting from the separate computation of the fees of the two funds constitutes unlawful and willful conversion, gift, waste and spoliation of the assets of the funds, gross abuse of trust, gross misconduct, willful misfeasance, bad faith, gross negligence or reckless disregard of official duties and breach of the Adviser's separate fiduciary duty to each fund, all in violation of The Investment Company Act, The Investment Advisers Act, common law and principles of equity.

(xiii) Had the assets of Stock Fund and Balanced Fund been treated as aggregated for purpose of the advisory fee, the fee paid to Adviser in 1971 would have been at least \$101,000 less than the actual fee of

approximately \$1,465,914 paid by both funds and the fee paid to Adviser in 1970 would have been at least \$105,000 less than the actual fee of approximately \$1,322,000. In all prior years comparable excess payments were extracted from the funds. The total of such excess payments constituted unjust enrichment of approximately \$700,000 at the expense of both funds for the six years preceding commencement of this action.

(xiv) In approving the investment advisory contract, the directors of each fund failed to exercise their fiduciary duties established by The Investment Company Act, common law and principles of equity in that they failed to protect the net assets of the respective funds from excessive charges by the Adviser and did not take into account identity of advice and services with the other fund.

(xv) Under the Investment Advisers Act and at common law, the Adviser was under a duty to advise each fund either to merge with the other so as to reduce advisory fees or to insist that the assets of both funds be aggregated for the purpose of fee computation.

(xvi) Proxy material of each fund has always failed to disclose that the respective advisory contracts permitted the collection of excessive fees and that significant savings could have been realized by insisting on the aggregation of assets of both funds for fee computations.

(xvii) By reason of the failure of the proxy statements to point out the possibility of reducing the investment Adviser's fees by aggregating the funds' net

assets for fee computation, the shareholders of the funds were effectively prevented from taking affirmative action to protect the funds at the annual stockholders' meeting and were effectively induced to rely upon, vote for and deliver their proxies to the defendants who mailed them, all of which left the funds without effective protection.

3. (c) Defendants' contentions as to liability and damages are as follows:

(i) The amount of the management fee paid to Stein Roe & Farnham ("Advisor") by Balanced Fund and Stock Fund is, as to each fund, a business decision properly made by the directors of the respective funds, and in particular the "unaffiliated" and "disinterested" directors, in the good faith exercise of their business judgment.

(ii) As a matter of law there is no requirement that the assets of Balanced Fund and Stock Fund be aggregated for the purpose of calculating the management fees or for any other purpose. Each fund is and at all times has been a separate fund with separate and distinct investment objectives and goals.

(iii) Each fund was organized for specific and distinct purposes to meet specific and distinct shareholder investment objectives, not for the purpose of unjustly enriching any of the defendants herein or anyone else.

(iv) The management fees paid to Advisor by each of the funds are and have at all times been fair and reasonable.

(v) The investment performance of both funds has been excellent and the management fees charged each fund rank among the lowest fees charged comparable funds for comparable services.

(vi) Plaintiff and all other shareholders of each of the funds invested in the funds with full knowledge of the applicable management fee schedule and the shareholders of both funds have ratified and approved the continuation of the management fee schedule at all times required by law.

(vii) The shareholders of both funds ratified and approved the management fee computation schedule with full knowledge of this action and plaintiffs are therefore estopped to litigate it.

(viii) None of the defendants was guilty of personal misconduct.

(ix) Defendants have violated no contractual, statutory or common-law duty to the funds or their shareholders.

(x) This action is barred by laches and estoppel.

(xi) This action is barred in part by the applicable statutes of limitations.

4. (a) Defendants' list of proposed trial exhibits is as follows:

- A. Minutes of the Annual Meeting of Shareholders of Balanced Fund held 2/28/69.
- B. Minutes of the Annual Meeting of Shareholders of Balanced Fund held 6/16/72.
- C. Minutes of the Annual Meeting of Shareholders of Stock Fund held 2/23/68.
- D. Minutes of the Annual Meeting of Shareholders of Stock Fund held 6/16/72.

- E. Minutes of Balanced Fund Board of Directors Meeting held 1/10/66.
- F. Minutes of Balanced Fund Board of Directors Meeting held 1/9/67.
- G. Minutes of Balanced Fund Board of Directors Meeting held 1/8/68.
- H. Minutes of Balanced Fund Board of Directors Meeting held 10/7/68.
- I. Minutes of Balanced Fund Board of Directors Meeting held 1/13/69 (with documents annexed showing directors' action by consent).
- J. Minutes of Balanced Fund Board of Directors Meeting held 7/14/69.
- K. Minutes of Balanced Fund Board of Directors Meeting held 10/13/69.
- L. Minutes of Balanced Fund Board of Directors Meeting held 1/12/70.
- M. Minutes of Balanced Fund Board of Directors Meeting held 4/13/70.
- N. Minutes of Balanced Fund Board of Directors Meeting held 7/13/70.
- O. Minutes of Balanced Fund Board of Directors Meeting held 7/20/70.
- P. Minutes of Balanced Fund Board of Directors Meeting held 10/12/70.
- Q. Minutes of Balanced Fund Board of Directors Meeting held 1/11/71.
- R. Minutes of Balanced Fund Board of Directors Meeting held 10/18/71.
- S. Minutes of Balanced Fund Board of Directors Meeting held 1/17/72.
- T. Minutes of Balanced Fund Board of Directors Meeting held 4/17/72.
- U. Minutes of Balanced Fund Board of Directors Meeting held 1/15/73.
- V. Minutes of Balanced Fund Board of Directors Meeting held 4/16/73.
- W. Minutes of Balanced Fund Board of Directors Meeting held 1/14/74.
- X. Minutes of Balanced Fund Board of Directors Meeting held 4/15/74.

- Y. Minutes of Balanced Fund Board of Directors Meeting held 1/13/75.
- Z. Minutes of Balanced Fund Board of Directors Meeting held 4/14/75.
- AA. Minutes of Stock Fund Board of Directors Meeting held 1/10/66.
- BB. Minutes of Stock Fund Board of Directors Meeting held 7/11/66.
- CC. Minutes of Stock Fund Board of Directors Meeting held 1/9/67.
- DD. Minutes of Stock Fund Board of Directors Meeting held 7/10/67.
- EE. Minutes of Stock Fund Board of Directors Meeting held 1/8/68.
- FF. Minutes of Stock Fund Board of Directors Meeting held 10/7/68.
- GG. Minutes of Stock Fund Board of Directors Meeting held 1/13/69 (with documents annexed showing directors' action by consent).
- HH. Minutes of Stock Fund Board of Directors Meeting held 7/14/69.
- II. Minutes of Stock Fund Board of Directors Meeting held 10/13/69.
- JJ. Minutes of Stock Fund Board of Directors Meeting held 1/12/70.
- KK. Minutes of Stock Fund Board of Directors Meeting held 4/13/70.
- LL. Minutes of Stock Fund Board of Directors Meeting held 7/13/70.
- MM. Minutes of Stock Fund Board of Directors Meeting held 7/20/70.
- NN. Minutes of Stock Fund Board of Directors Meeting held 10/12/70.
- OO. Minutes of Stock Fund Board of Directors Meeting held 1/11/71.
- PP. Minutes of Stock Fund Board of Directors Meeting held 10/18/71.
- QQ. Minutes of Stock Fund Board of Directors Meeting held 1/17/72.
- RR. Minutes of Stock Fund Board of Directors Meeting held 4/17/72.

- SS. Minutes of Stock Fund Board of Directors Meeting held 1/15/73.
- TT. Minutes of Stock Fund Board of Directors Meeting held 4/16/73.
- UU. Minutes of Stock Fund Board of Directors Meeting held 1/14/74.
- VV. Minutes of Stock Fund Board of Directors Meeting held 4/15/74.
- WW. Minutes of Stock Fund Board of Directors Meeting held 1/13/75.
- XX. Minutes of Stock Fund Board of Directors Meeting held 4/14/75.
- YY. Balanced Fund Proxy Statement dated January 31, 1966.
- ZZ. Balanced Fund Proxy Statement dated January 31, 1967.
- 3A. Balanced Fund Proxy Statement dated January 25, 1968.
- 3B. Balanced Fund Proxy Statement dated January 31, 1969.
- 3C. Balanced Fund Proxy Statement dated January 29, 1970.
- 3D. Balanced Fund Proxy Statement dated January 29, 1971.
- 3E. Balanced Fund Proxy Statement dated May 11, 1972.
- 3F. Balanced Fund Proxy Statement dated May 8, 1973.
- 3G. Balanced Fund Proxy Statement dated May 14, 1974.
- 3H. Stock Fund Proxy Statement dated January 31, 1966.
- 3I. Stock Fund Proxy Statement dated January 31, 1967.
- 3J. Stock Fund Proxy Statement dated January 25, 1968.
- 3K. Stock Fund Proxy Statement dated January 31, 1969.
- 3L. Stock Fund Proxy Statement dated January 29, 1970.
- 3M. Stock Fund Proxy Statement dated January 29, 1971.
- 3N. Stock Fund Proxy Statement dated May 11, 1972.
- 3O. Stock Fund Proxy Statement dated May 10, 1973.
- 3P. Stock Fund Proxy Statement dated May 15, 1974.
- 3Q. Balanced Fund Prospectus dated April 14, 1966.
- 3R. Balanced Fund Prospectus dated April 25, 1967.
- 3S. Balanced Fund Prospectus dated February 26, 1968.

- 3T. Balanced Fund Prospectus dated April 21, 1969.
- 3U. Balanced Fund Prospectus dated April 23, 1970.
- 3V. Balanced Fund Prospectus dated April 21, 1971.
- 3W. Balanced Fund Prospectus dated April 25, 1972.
- 3X. Balanced Fund Prospectus dated April 4, 1973.
- 3Y. Balanced Fund Prospectus dated April 4, 1974.
- 3Z. Balanced Fund Prospectus dated April 21, 1975.
- 4A. Stock Fund Prospectus dated April 15, 1966.
- 4B. Stock Fund Prospectus dated April 25, 1967.
- 4C. Stock Fund Prospectus dated April 18, 1968.
- 4D. Stock Fund Prospectus dated April 21, 1969.
- 4E. Stock Fund Prospectus dated April 23, 1970.
- 4F. Stock Fund Prospectus dated April 21, 1971.
- 4G. Stock Fund Prospectus dated April 21, 1972.
- 4H. Stock Fund Prospectus dated May 5, 1973.
- 4I. Stock Fund Prospectus dated April 8, 1974.
- 4J. Stock Fund Prospectus dated April 17, 1975.
- 4K. Balanced Fund and Stock Fund Expense Study dated June 29, 1967.
- 4L. Balanced Fund and Stock Fund Expense Study dated September 24, 1968.
- 4M. Balanced Fund Expense Study dated October 8, 1969.
- 4N. Balanced Fund Expense Study dated October 7, 1970.
- 4O. Balanced Fund Expense Study dated October 12, 1971.
- 4P. Balanced Fund Expense Study dated January 8, 1973.
- 4Q. Balanced Fund Expense Study dated January 8, 1974.
- 4R. Balanced Fund Expense Study dated January 8, 1975.
- 4S. Stock Fund Expense Study dated October 8, 1969.
- 4T. Stock Fund Expense Study dated October 7, 1970.
- 4U. Stock Fund Expense Study dated October 12, 1971.
- 4V. Stock Fund Expense Study dated January 8, 1973.

- 4W. Stock Fund Expense Study dated January 8, 1974.
- 4X. Stock Fund Expense Study dated January 8, 1975.
- 4Y. Wiesenberger Services Inc., Mutual Fund Performance Monthly, April 1975.
- 4Z. Schedule of Expense Ratios for no-load mutual funds with assets over \$50 million.
- 5A. Schedule of Expense Ratios for mutual funds with assets of \$100-\$250 million.
- 5B. Schedule showing bundling of assets by major mutual fund complexes for purposes of calculation of management fees, as of 12/31/73.
- 5C. Document entitled "Wacker-Adams Data Service Corporation, Accumulated Unit Cost Report Adjusted to Reflect Incremental GIS Cost and Allocation of Service Corporation Expenses for the Twelve Months Ending June 30, 1973."
- 5D. Document entitled "Wacker-Adams Data Service Corporation, Adjusted Unit Cost Report for the Period Ending June 30, 1974."
- 5E. Letter to Securities and Exchange Commission from Robert L. Mueller of Stein Roe & Farnham Fund dated April 8, 1970.
- 5F. Memorandum to RAW and LH from CCO dated 12/5/71
- 5G. Memorandum to the Executive Committee from Robert L. Mueller re "Fees For Maintenance of Mutual Fund Shareholder Accounts."
- 5H. Schedule showing profits after taxes of major publicly-held management companies.
- 5I. Letter to Shareholders of the Stein Roe & Farnham Fund, Inc. from Harry H. Hagey, Jr., dated July 17, 1958.
- 5J. Booklet entitled "Information About Stein Roe & Farnham Balanced Fund, Inc., Stock Fund, Inc., Capital Opportunities Fund, Inc." prepared by Stein Roe & Farnham (including earlier editions).

4. (b) Plaintiffs' list of proposed trial exhibits is as follows:

All depositions taken by plaintiff and all exhibits thereto, in addition to the defendants' trial exhibits.

4. (c) All exhibits will be exchanged and pre-marked for identification by counsel before the trial.

Each party agrees to file its objections to the admissibility of exhibits within ten days after the pre-marking session.

(d) Should any party hereafter decide to offer additional exhibits, prompt notice of that fact will be given to the other party and to the Court.

5. (a) The defendants' list of prospective trial witnesses are as follows:

Rex James Bates	Alfred F. Kugel
Ben A. Beavers	Donald McDonough
R. Douglass Cooper	Robert L. Mueller
Jim Doherty	Arthur C. Nielsen, Jr.
Charles Wells Farnham	Gene C. O'Connell
Harry Hagey, Jr.	Alden L. Odt
Lawrence Hickey	Joseph Sondheimer
James K. Hotchkiss	Sydney Stein, Jr.
Lemuel B. Hunter	Richard H. Templeton
John Jeuck	Henry B. Thielbar
Norman Johnson	John M. Tittle
	Robert A. Woods

5. (b) The plaintiffs' prospective list includes those listed above and John Quint. Should any party hereafter decide to call any additional witnesses, prompt notice of their identity shall be given to each other party and to the Court.

6. The plaintiffs' claims for damages or other relief are as set forth in the complaint.

7. Plaintiff expects to require two trial days and defendants expect to require three trial days.

## 8. Statement of issues to be tried.

(a) Is there federal jurisdiction?

(b) Should relief be granted as requested  
in the complaint?Dated: New York, New York  
May 22, 1975.

SO ORDERED:

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HJR U.S.D.J.

Consented to:

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/S/ Markewich, Rosenhaus, Markewich & Friedman  
Attorneys for Plaintiffs B.F.

---

/S/ Sullivan & Cromwell  
\*Attorneys for Defendants (Other than the Funds)

\* The above consent to this proposed order on the part of defendants' counsel is conditioned upon this notation by me that counsel for plaintiff states that he declines at this time to cite any particular section or part of the statutes referred to in ¶3(b) hereof (to wit, The Investment Company Act of 1940, the Investment Advisors Act of 1940, the Securities Exchange Act of 1934, the Securities Act of 1933, and the Rules and Regulations under each Act) has having been violated by the defendants herein.

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/S/ Harold J. Raby  
HAROLD J. RABY  
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



CHARLES R. WOLFSON, RICHARD R. WOLFSON and  
LOUIS OKIN as Executors of the Estate of  
NATHANIEL C. WOLFSON, deceased, and HERBERT  
A. FUENTE,

Plaintiffs,

72 Civ. 2215 (LWP)

-against-

SUPPLEMENT TO  
PRE-TRIAL ORDER

R. DOUGLASS COOPER, CHARLES FARNHAM,  
HARRY HAGEY, JR., LAWRENCE HICKNY,  
LEMUEL HUNTER, JOHN JEUCK, SYDNEY STEIN,  
JR., RICHARD TEMPLETON, HENRY THIELPAF,  
JOHN TITTLE, ROBERT WOODS, SR&F SERVICE  
CORPORATION, WACKER-ADAMS DATA SERVICE  
CORP., STEIN ROE & FARNHAM, STEIN ROE  
& FARNHAM STOCK FUND, INC., and STEIN  
ROE & FARNHAM BALANCED FUND, INC.,

Defendants.

The following supplement to paragraph 3(b) of the pre-trial order herein sets forth plaintiffs' contentions as to the statutory basis and the period of time covered by each count of the amended complaint. In each case except for Count 2, the period of time covered commences six years prior to the filing of the original complaint on or about May 23, 1972. In counts 1, 3 and 4 plaintiffs contend defendants also violated common law and principles of equity.

<u>Count</u>	<u>Time Covered</u>	<u>Statutory basis</u>
1st	Until June 14, 1972	Investment Company Act §§36(a) and 37 and former section 36
2nd	After June 14, 1972	Investment Company Act §36(b)

(40)

3rd	Until June 14, 1972	Investment Company Act §36(a)
4th	Until December 31, 1975	Investment Advisors Act §206
5th	Until December 31, 1975	Investment Company Act §15(a)
6th	Until trial	Investment Advisors Act §§206 and 207
<i>Dropped -</i> 7th	Until December 31, 1975	Investment Advisors Act §§206 and 207

So Ordered

Consented to:

*Mr. John M. L. P. C.*  
Attorneys for plaintiffs

*Sullivan & Connell*  
Attorneys for Defendants (other than the funds)

4/14/76  
PM 1a

53 A

1 jpmch

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----x  
CHARLES R. WOLFSON, :  
RICHARD R. WOLFSON, and :  
LOUIS OKIN, as Executors of the :  
Estate of NATHANIEL C. WOLFSON, :  
Deceased, and HERBERT A. FUENTE, :

Plaintiffs, : 72 Civil 2238

v. :

R. DOUGLASS COOPER, :  
CHARLES FARNHAM, :  
HARRY HAGEY, JR., :  
LAWRENCE HICKEY, :  
LEMUEL HUNTER, :  
JOHN JEUCK, :  
SIDNEY STEIN, JR., :  
RICHARD TEMPLETON, :  
HENRY THIELBAR, :  
JOHN TITLE, :  
ROBERT WOODS, :  
SR & F SERVICE CORPORATION, :  
WACKER-ADAMS DATA SERVICE CORP., :  
STEIN, ROE & FARNHAM, :  
STEIN, ROE & FARNHAM STOCK FUND, :  
INC., and :  
STEIN, ROE & FARNHAM BALANCED FUND, :  
INC., :

Defendants. :  
-----x

Before: HON. LAWRENCE W. PIERCE,

District Judge.

New York, New York  
April 14, 1976 - 2:00 p.m.

1 2 jpmch

2 APPEARANCES:

3 MARKEWICH, ROSENHAUS, MARKEWICH & FRIEDMAN, Esqs.,  
Attorneys for Plaintiffs,  
4 By: BENNETT FRANKEL, Esq., of Counsel.

5  
6 SULLIVAN & CROMWELL, Esqs.,  
Attorneys for all non-Fund Defendants,  
7 By: MARVIN SCHWARTZ, Esq., and of Counsel.  
8 ROBERT OWEN, Esq.,

9 PAUL J. MILLER, Esq.,  
Attorney for Defendant Balanced Fund.

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11 WILLIAM PETERSEN, Esq.,  
Attorney for Defendant Stock Fund.

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2 (In open court)

3 (Case called)

4 THE COURT: Good afternoon, gentlemen.

5 MR. SCHWARTZ: Your Honor, may I?

6 THE COURT: Appearing for the plaintiff is  
7 Mr. Bennett Frankel.

8 MR. FRANKEL: Yes, your Honor.

9 THE COURT: For all defendants except Balanced  
10 Fund and Stock Funs is Sullivan & Cromwell, by Mr.  
11 Owen and Mr. Schwartz.

12 Who is trial counsel?

13 MR. SCHWARTZ: I am, your Honor.

14 THE COURT: Mr. Schwartz.

15 For Balanced Fund we have Mr. Miller.

16 MR. MILLER: Your Honor.

17 THE COURT: And for Stock Fund we have Mr.  
18 William Petersen.

19 MR. PETERSEN: Here, your Honor.

20 THE COURT: Mr. Frankel, you represent all  
21 plaintiffs?

22 MR. FRANKEL: Yes, your Honor.

23 THE COURT: Is there a plaintiffs' exhibit list?

24 MR. FRANKEL: Yes, your Honor.

25 The exhibits of plaintiffs are here, 161

1 4 jpmch

2 premarked exhibits, and the exhibits are all here.

3 This would be a good time to mark them in  
4 evidence. I understand there is no objection.

5 THE COURT: If there is no objection.

6 Addressing the exhibits set forth on the  
7 plaintiffs' index of trial exhibits, ranging from Plaintiffs'  
8 1 through Plaintiffs' 161, plaintiffs offer them all in  
9 evidence. There being no objection, they are received.

10 (Plaintiffs' Exhibits Nos. 1 through 161  
11 received in evidence.)

12 MR. FRANKEL: May I respectfully suggest that  
13 the index be marked for identification?

14 THE COURT: Yes, that is a good idea. Let's  
15 mark the index 1A for identification. Is that satisfactory?

16 MR. FRANKEL: Any marking, your Honor.

17 If your Honor please, there is a deposition  
18 of Mr. Lawrence Hickey which was taken in Chicago on  
19 April 25, 1975. I'd like to mark certain portions of that  
20 into evidence.

21 THE COURT: How do you spell his last name?

22 MR. FRANKEL: H-i-c-k-e-y.

23 I have a list of the portions to be marked.  
24 May I suggest that we first mark the list of the portions  
25 as an exhibit for identification only, and then I'll offer

xxx

1 5 jpmch

2 the respective portions of the deposition itself in  
3 evidence.

4 THE COURT: Is 161A a satisfactory marking  
5 for the list of the proposed selections?

6 MR. FRANKEL: Yes.

7 THE COURT: So marked.

8 (Plaintiffs' Exhibits Nos. 1A and 161A marked  
9 for identification.)

10 MR. FRANKEL: The deposition itself would be  
11 the next exhibit which I think would be 162.

12 MR. SCHWARTZ: May it please the Court, we  
13 just received a few moments ago a list of the excerpts  
14 of the deposition that Mr. Frankel hopes to offer.

15 As your Honor can see, they are numerous,  
16 and some of them are rather short, and we can't immediately  
17 say whether, for the sake of completeness, other things  
18 should be added. I would propose that since there is no  
19 jury here, the entire deposition be received in evidence,  
20 and either party can cite from it to the extent he feels  
21 appropriate.

22 THE COURT: Any objection?

23 MR. FRANKEL: I have no objection to that.

24 THE COURT: Fine. That exhibit 162 is received  
25 in evidence, the deposition of Lawrence Hickey, and just

1 6 jpmch

Quint-direct

2 give me a date on that, if you will.

3 MR. FRANKEL: It is a deposition held April 25,  
4 1975.

5 THE COURT: Mr. Frankel?

6 J O N E D W A R D Q U I N T, called  
7 as a witness on behalf of the plaintiffs, being  
8 first duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MR. FRANKEL:

11 Q Mr. Quint, what is your home address?

12 A 175 Adams Street, Brooklyn.

13 Q What is your occupation or profession?

14 A I'm an attorney-at-law, admitted in the State  
15 of New York and to this court.

16 Q Do you have any association with Markewich,  
17 Rosenhaus, Markewich & Friedman, the attorneys for the  
18 plaintiffs?

19 A Yes, I do. I'm an associate with the firm.

20 Q You are not a partner; you are an employee?

21 A Correct.

22 Q How long have you been associated with that  
23 firm?

24 A Since I was admitted to the bar, approximately  
25 two years ago.

1 7 jpmch

Quint-direct

2 Q Have you made a study of the subject matter  
3 of this lawsuit?

4 A Yes, I have.

5 Q Will you tell your Honor briefly what you did  
6 in connection with that study?

7 A Using the quarterly reports that are supplied  
8 by the funds which were produced to my employer during the  
9 course of this litigation, I studied each of the reports.  
10 Each of those reports contains a listing of the holdings  
11 of each fund that the report covers for the fiscal quarter  
12 that that report in fact covers. They issued a report  
13 each quarter.

14 At the end of March they called it a quarterly  
15 report. At the end of June they called it a semi-annual  
16 report. At the end of September it was called a quarterly  
17 report, and at the end of December it was called an annual  
18 report.

19 (Continued on next page)

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Quint-direct

THE COURT: You are referring to each fund?

THE WITNESS: Each fund, each quarter. Each fund issued four of these reports during each year which reflected at the date of the report the exact holdings of each fund at that time. They were listed in a tabular form inside each of these reports and I believe all the reports have been marked in evidence.

They are similar in each quarter, I mean the format of each report.

Now, each report lists the holdings by security of each of the funds, common stock or non-common stock, which they would sometimes denote fixed term investment or short term investment or preferred stock or some other appellation which might fit the description of the stock.

They were grouped normally by industry types as opposed to being grouped in alphabetical order.

Now, I took the Stock Fund reports which are one of the two funds for each quarter, beginning in the quarter that ended with the last day of June, 1966, and compiled from each of those quarterly reports a tabulation of the holdings of each individual issue of stock that might be held at any one time.

jpb-2

Quint-direct

On each sheet of paper that I used to prepare these reports, I would put the name of the corporation or the stock issuing company, normally a corporation, and then from the first line on through in chronological order, list the number of shares and the dollar value of those shares that that fund held at that time.

So after the completion of analyzing all the Stock Fund reports from June '66 through December 31, 1967, I had a list of every stock issue that was ever held in Stock Fund over that period of time, and at any one point in time the dollar amount and the number of shares that the Stock Fund held of that issue.

Then with those compilations I then took the quarterly report for Balanced Fund, which reflect the holdings of Balanced Fund at the exact point in time, each quarter, from June 1966 to December 1975.

Taking any one quarter's report, I then logged onto the same sheets that indicated the name of a company whose stock was held in Stock Fund, the amount in shares and in dollars that Balanced Fund held of that same issue.

So after -- this was done for every quarter through December of 1975, except for a few quarters except

jpb-3

Quint-direct

where the work has not yet been completed on.

The resulting collection were a group of sheets, each sheet reflecting one stock issue, one corporation stock and indicating that at any point in time from the quarters ending in June of '66 through December '75, whether Stock Fund held that stock and if they did in what amount at that time.

And then whether Balanced Fund held that stock at the same amount at the same point in time, and if so to what extent in shares and dollar amount.

Now, using those sheets and in addition maintaining lists to the side of those common stocks that were held in Balanced Fund that never appeared over the course of these almost ten years in Stock Fund, I did a compilation for each quarter of the period covered from June, 1966, to December 1975.

The compilation showed, these summary sheets showed --

MR. SCHWARTZ: I object, your Honor. I don't think this was responsive to what the question was.

MR. FRANKEL: Yes.

Q Why don't you stop your answer there. You have answered the question I asked. Let me ask the next question.

jpb-4

Quint-direct

What, as the result of the work you did, did you find there was any similarity in the stock holdings of the two funds?

MR. SCHWARTZ: I am compelled, may it please the Court, to object to that question.

I must object first on the ground that I am reluctant to be certain of which, and I feel I am compelled to be certain.

Mr. Quint is a lawyer associated with the firm which has been attorney for the plaintiffs in this action since its inception. To my personal knowledge, he has been an attorney for the plaintiffs in this case since its inception. Particularly in the light of disciplinary Rule 5101, I must object to any testimony on his part which relates to any matter other than the one which is clearly uncontested or which relates solely to a formality.

Now, if Mr. Quint is testifying to compilations from quarterly reports since those quarterly reports are in evidence without any objection, then I say his testimony is wholly irrelevant and is beside the point, and is unnecessary and the problem posed by the disciplinary rule is obviated.

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Quint-direct

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2 THE COURT: Mr. Frankel, without indicating  
3 whether I agree with counsel's interpretation of 101 in  
4 a non-jury case, what is your response to his assertion  
5 that the documents are in evidence and can be interpreted  
6 by the Court?

7 (continued on next page.)  
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Tk 2A

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Quint-direct

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2 MR. FRANKEL: We are trying to lighten the  
3 Court's burden going through these to arrive --

4 THE COURT: Might that not be accomplished by  
5 the submission of proposed findings?

6 MR. FRANKEL: It has been already accomplished  
7 by the pretrial order, and the conclusions that Mr. Quint  
8 is about to come forth with, if he is permitted to do so,  
9 those are already contained in the pretrial order as  
10 uncontested.

11 THE COURT: Is there a need for us to address  
12 it from the stand then?

13 MR. FRANKEL: I suppose since it is in the pre-  
14 trial order, we can leave it there.

15 THE COURT: Fine. Do you wish him to step  
16 down?

17 MR. FRANKEL: Unless you have any questions.

18 MR. SCHWARTZ: No, sir.

19 THE COURT: Step down.

20 If you wish you can direct my attention specific-  
21 ally to the portion of the pretrial order or supplemental  
22 you wish to be made known.

23 MR. FRANKEL: Perhaps I could do that right now.

24 In the pretrial order the extent of the  
25 similarities is set forth starting on page 4 of the pretrial

1 order and continuing through page 6.

2 Now, if your Honor please, it is rather awkward but I have not received any answer to the supplemental  
3 amended complaint from the two funds, and part of my job  
4 here is to prove that my plaintiff is an owner.  
5

6 As to one plaintiff, I have no problem because  
7 there are exhibits which show that they are owners, but as  
8 to the other plaintiff, I need the answer because the answer  
9 of that Fund presumably is going to admit he is an owner.  
10 If they don't admit it, I will have to prove it. I  
11 don't know what thir position is.  
12

13 MR. MILLER: Speaking for the Balanced Fund,  
14 our answer will admit that the plaintiff is a holder of  
15 the shares of Balanced Fund.

16 MR. FRANKEL: If your Honor please, with that  
17 admission the plaintiff can rest.

18 THE COURT: Why don't you reserve any motions?

19 MR. SCHWARTZ: Yes, sir.

20 THE COURT: Mr. Schwartz?

21 MR. SCHWARTZ: Your Honor, I offer in evidence  
22 Defendants' Exhibits A through DT, and for your Honor's  
23 convenience, I have here a list of those documents.

24 THE COURT: I think I have one, counsel.

25 MR. SCHWARTZ: We did give you one?

pgb-3

THE COURT: Yes, index of defendants' trial exhibits.

MR. SCHWARTZ: They have all been premarked, your Honor.

THE COURT: Any objection?

MR. FRANKEL: No objection, your Honor.

THE COURT: The defendants offer into evidence all of defendants' exhibits set forth on the index of defendants' trial exhibits, which we will mark -- is A-1 satisfactory?

MR. SCHWARTZ: Of course, your Honor.

THE COURT: The index is marked A-1 for identification.

xxx (Defendants' Exhibit A-1 was marked for identification.)

THE COURT: And the exhibits set forth therein will take us from Defendants' Exhibits A through DT. All are received, there being no objection.

MR. FRANKEL: That is correct.

I assume these are the ones we marked together?

MR. OWEN: Yes.

MR. SCHWARTZ: Mr. Woods, please.

xxx (Defendants' Exhibits A through DT, inclusive, received in evidence.)

pgb-4

Woods-direct

ROBERT A. WOODS, called as a witness  
by the defense, being first duly sworn, was examined  
and testified as follows:

DIRECT EXAMINATION

BY MR. SCHWARTZ:

Q Mr. Woods, where do you live?

A 470 Orchard Lane, Winnetka, Illinois.

Q What is your occupation?

A I am a partner of Stein, Roe & Farnham.

Q Do you hold any position in the Balanced Fund?

MR. SCHWARTZ: May it please the Court, I will  
not refer to the fund by its full name.

A I am the president.

Q Do you hold any position in the Stock Fund?

A I am also president.

Q For how many years have you held those positions  
in the two funds?

A I was elected president in 1971.

Q Of both funds?

A Of both funds.

End 2A

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1 pgmch Woods-direct

2 Q Prior to becoming president of both Funds in  
3 1971, what, if any, offices did you hold in the two Funds?

4 A I was assistant secretary of the Balanced  
5 Fund at its inception in 1949. I became secretary in 1954.

6 I became a director of the Balanced Fund in  
7 1967 and I became a director of the Stock Fund in 1967.

8 Q Would you tell the Court, Mr. Woods, briefly,  
9 of your educational background?

10 A I grew up and was educated in the public  
11 schools of Evanston, Illinois.

12 I went to the University of Rochester on a  
13 prize scholarship, and I graduated Phi Beta Kappa, was  
14 president of the student body of Rochester.

15 I then went to Harvard Business School on  
16 a National scholarship.

17 I was interrupted by three years of service  
18 in WW2, returned to Harvard Business School, received my  
19 master's degree in business with distinction, and was a Baker  
20 scholar, which is the Harvard honorary.

21 Q Are you a trustee of the University of  
22 Rochester?

23 A I served five years as alumni trustee and  
24 now technically I'm an honorary trustee.

25 Q Are you now a director and have you served in

1 2 pgmch

Woods-direct

2 the past as president of the Juvenile Protective  
3 Association?

4 A Yes. It's a charity dealing with neglected  
5 and abused children. I was president.

6 Q Have you served as a director of the Infant  
7 Welfare Society of Chicago?

8 A I have, and I'm still a director.

9 Q Where does Stein, Roe & Farnham have its  
10 headquarters?

11 A In Chicago, at 150 South Wacker Drive.

12 Q Is that where you personally maintain your  
13 office?

14 A Yes.

15 Q Is Stein, Roe & Farnham a partnership?

16 A It is.

17 Q Tell the Court briefly what the business of  
18 Stein, Roe & Farnham is.

19 A Stein, Roe and Farnham is in one business and  
20 that's investment counseling. Our sole business is to  
21 give investment advice and manage portfolios.

22 We are not bankers. We are not brokers.  
23 We are not investment bankers. And we have no affiliations.

24 I think we have no conflicts of interest;  
25 solely giving investment advice, that's what we do.

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- Q How large an organization is the firm?
- A There are approximately two hundred people.
- Q Of the two hundred, how many are professionals?
- A Approximately seventy.
- Q What is the approximate value of the assets, portfolio assets, of Stein, Roe & Farnham's clients managed by the firm?
- A It is in the neighborhood of \$4 billion.
- Q Stein, Roe & Farnham serves, does it not, as investment manager for the Balanced Fund?
- A It does.
- Q And it serves in the same capacity, does it not, for the Stock Fund?
- A Yes.
- Q What, as of this date, are the approximate assets of the Balanced Fund?
- A The Balanced Fund assets at year end were \$137 million. They are at least 10 percent higher today.
- Q What were the assets of the Stock Fund?
- A The Stock Fund assets at year end were \$163 million, and they're 14 percent higher or so at the end of the quarter.
- Q So, the total assets of the two Funds are on the order of \$300 million, as compared to \$4 billion

1 4 pgmch

Woods-direct

2 in total assets under management?

3 A That's correct.

4 Q Tell the Court, briefly, Mr. Woods, how  
5 Stein, Roe & Farnham goes about the business of selecting  
6 securities for the portfolios of its clients.

7 A We have a substantial research staff,  
8 including something over twenty professionals. About half  
9 of these are partners of the firm of Stein, Roe & Farnham.

10 We do extensive research in not only examining  
11 published data but in traveling and visiting the companies  
12 in which we are investing or which we think we might like  
13 to invest in.

14 I think we were one of the early funds to  
15 begin this sort of field research and we have valuable  
16 contacts that these men have built up over the years.

17 We do not invest in securities unless we  
18 have investigated the companies and gotten to know the  
19 people, have an idea of what we think of the future of  
20 that business.

21 These research men have, on average, over  
22 ten years of experience in the business. Some of them  
23 go up to thirty years.

24 In addition to this work, we are doing more  
25 and more with the computer. We spent large sums of money

5 pgmch

Woods-direct

in this area. It does not give you the final answer or make judgments, but it is a most helpful tool.

We have computer data on hundreds of companies concerning book value, dividends, plant investment and so forth. This is proving to be a helpful tool. That's what it is.

(Continued on next page)

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jpmch 1 Woods-direct

Q Does Stein, Roe & Farnham function in the area of long-range economic trends?

A We do.

Several of the research men devote themselves to the analysis of business prospects, business trends, interest rates, and this is important in setting investment policy.

Q Now, you said a moment ago in response to an earlier question that Stein, Roe & Farnham serves as investment manager for both of the Funds involved in this lawsuit; that's correct, is it not?

A That's correct.

MR. SCHWARTZ: If I may be forgiven for leading during this preliminary area:

Q Is it correct that Stein, Roe & Farnham serves as manager to each of the Funds pursuant to separate written contracts?

A That's correct.

Q And those are known, I take it, in the industry as investment management contracts?

A Yes.

Q Would you describe in summary form, Mr. Woods, what services Stein, Roe & Farnham renders to both Funds under these separate contracts?

jpmch 2

Woods-direct

A The most important service in my mind is the investment advice, the investment of the assets of the two Funds. That's where the research work and so forth feeds in.

In addition to that, Stein, Roe & Farnham provides office space to the Fund. It provides -- the partnership provides the personnel to run that Fund office. There are twenty employees of the firm working in the Fund office.

The Fund office itself files the SEC material. It files material with the fifty states; both Funds are registered and blue-skyed in all fifty states. It deals with the counsel and auditors, and it does the complete job of running two large corporations.

THE COURT: Am I to understand that what you are saying is that Stein Roe furnishes the office space to each of the two Funds and furnishes the personnel to run their offices, and that there are twenty employees in these offices serving the two Funds?

THE WITNESS: That's correct.

THE COURT: Are they intermingled? Is there any separation among these twenty people with respect to the Funds?

THE WITNESS: Certain of the people work

jpmch 3

Woods-direct

specifically on the records of one Fund. We have a desk for one Fund, and another works on the desk of another Fund. The people who oversee the desks may be working on both.

THE COURT: Thank you.

Q Would it be fair to say, Mr. Woods, that Stein, Roe & Farnham provides to the two Funds all of the services which normally would be rendered to a corporation by salaried officers and employees?

A Yes, it does.

Q Does the Fund have any salaried employee or officer, either Fund?

A No. Neither Fund has any salaried employee.

Q Now, I take it Stein, Roe & Farnham is paid for the services it renders to the two Funds?

A Happily, yes.

Q Could you describe the method by which its compensation is determined in the case of the two Funds?

A With each Fund, we have an investment management contract calling for a fee stated on an annual basis of 1/2 of 1 percent per year on the first \$100 million of assets under management. In each Fund, the excess over \$100 million is billed at a reduced rate of 4/10 of 1 percent.

Q Of the total expenses of each Fund, what proportion does the management fee constitute?

1 jpmch 4

Woods-direct

2 A The management fee constitutes the great bulk  
3 of the expense. It would be better than 80 percent of  
4 the total.

5 Q Of each Fund's total expense?

6 A Of each Fund's total expense, more than 80  
7 percent is represented by management.

8 Q Are you generally familiar with the manner  
9 in which mutual funds are managed in this country?

10 A I think so.

11 Q Is the method of operation you have described  
12 for these two Funds, that is, management by a separate  
13 corporation under contract, usual or unusual in the  
14 investment company industry in this country?

15 A I think it is the most common method of  
16 operation.

17 Q What is the expense ratio, Mr. Woods, of a  
18 mutual fund?

19 A You mean what is the definition of it?

20 Q Yes. What is it?

21 A The expense ratio is the ratio of the total  
22 expenses of the fund including the management fee to the  
23 total assets of the fund.

24 Q What is currently, or at the end of the last  
25 year, the expense ratio of the Balanced Fund?

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Woods-direct

A It has run in the neighborhood recently of .58 to -- roughly, .6 -- 6/10ths of 1 percent.

Q And the Stock Fund?

A The Stock Fund is very similar, maybe .61, but these change from year to year. I am not giving you an exact figure for one year.

Q Would it be correct to say that a fund which has an expense ratio of .6 spends in the aggregate 6/10ths of 1 percent per year for each \$100 of its total assets? Is that what the ratio means?

A 6/10ths --

Q of a cent.

A Yes.

No, wait. It is 60 cents per \$100. It is 60 cents per \$100. One dollar would be 1 percent. 60 cents per \$100.

MR. FRANKEL: Isn't it 60 cents per \$10?

MR. SCHATZ: 60 cents per \$100.

A If 1 percent expense ratio would be \$1 for \$100, 6/10ths would be 60 cents for managing \$100.

Q Is the expense ratio, as you have just described it, the generally accepted measure in the investment company industry for comparing the expense performance of mutual funds?

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jpmch 6

Woods-direct

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2 A Yes, I think it is the most common way to do  
3 it.

4 Q Are you familiar with the expense ratios  
5 of mutual funds in general?

6 A Yes, in general.

7 Q It is correct, is it not, that the expense  
8 ratios of all mutual funds are publicly reported in a  
9 variety of sources?

10 A It is required that they be reported in  
11 annual prospectuses, yes. They are public.

12 Q How does the expense ratio of these two  
13 Funds, the Balanced Fund and the Stock Fund, compare  
14 with comparable mutual funds in this country?

15 A According to studies that we have made from  
16 published audit data, our expense ratios are among the  
17 lowest in the industry.

18 Q Now, Stein, Roe & Farnham serves, does it  
19 not, as investment manager not only for these two Funds  
20 and for other investors with aggregate assets of \$4 billion  
21 or so, but is investment manager for two other funds;  
22 is that correct?

23 A That's correct.

24 Q How common in the mutual fund industry is  
25 it for one investment management firm to manage more than

1 jpmch 7 Woods-direct

2 one mutual fund or investment company?

3 A It is really quite common. There are a  
4 number of fund complexes that I am aware of.

5 Q Where one manager serves as the manager for  
6 several funds?

7 A Correct.

8 Q Is the information on the fee arrangements  
9 between such managers and their funds a matter of public  
10 record?

11 A It is.

12 Q And prospectuses, registration statements  
13 and various publications are common in the industry?

14 A That's correct.

15 Q Now, the fee payable by each of the Funds in  
16 this case is separately computed, is it not?

17 A Yes, it is.

18 Q So each Fund's assets stand by themselves  
19 for purposes of fee categorization?

20 A Correct.

21 Q Are you aware of any fund complexes, if I may  
22 use that word, where one manager manages more than one  
23 fund and where the assets of the funds are aggregated for  
24 purposes of computing the fee?

25 A There are some. I can think of several.

jpmch 8

Woods-direct

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2 Q In your view, is there such a thing as a  
3 prevailing practice in this regard? What is more  
4 common where there is a complex --

5 MR. FRANKEL: I will object to that unless  
6 the witness can tell us he made a study and has gone into  
7 this.

8 MR. SCHWARTZ: It is in evidence. We have  
9 a tabulation in evidence.

10 I will withdraw the question.

11 Q Are you aware, Mr. Woods, of the fee arrangements  
12 for the group of mutual funds managed by Eaton & Howard  
13 in Boston?

14 A Yes, I am.

15 Q Could you describe to the Court what those  
16 fee arrangements are, in general terms?

17 A My recollection is that they are aggregated  
18 for their funds, but that the fee runs at a straight  
19 1/2 of 1 percent.

20 Q On all of the fund assets in the aggregate?

21 A All of the funds' assets in the aggregate.

22 Q What is your latest information on the total  
23 assets of the funds under management by Eaton & Howard?

24 A They are in the neighborhood of \$300 million.

25 Q Is it correct that if the formula employed by

jpmch 9

Woods-direct

Eaton & Howard were applicable to these Funds, the fee would be higher by about \$100,000 a year?

A That's correct.

Q Would you tell the Court what you know about the fee arrangements of the Keystone group of mutual funds in Boston?

A Keystone is a large group with several funds. Their assets are in the neighborhood of \$1 billion.

Q A billion?

A \$1 billion, as I recall.

They aggregate the funds for fee purposes, and they charge 1/2 of 1 percent on the first \$500 million under management. Then they drop it to 45/100ths on the next \$500 million, and I think there is another drop over a billion, but it's never concerned us. I think it goes down to 4/10ths at a billion.

Q In the case of the Keystone organization, is there an additional charge of 1/4 of 1 percent on the first \$500 million of assets called a recurring charge?

A They do have an additional charge to cover expenses and so forth.

Q Is it correct, then, that on the first \$500 million of assets managed by Keystone that the management fee and recurring charge aggregates .75 percent?

jpmch 31

Woods-direct

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A Yes, sir.

Q So, if the Keystone formula were applicable to these two Funds, and if the assets of these Funds were aggregated, is it correct that the additional cost of the two Funds would be about \$150,000?

A Yes, that's correct.

Q What do you know about the fee arrangements of the National Securities group of funds which, as I recall it, are managed here in New York?

A National Securities is a contract, as I recall, that is 1/2 of 1 percent on the first \$410 million and then drops to 3/8ths of 1 percent on the excess.

(Continued on next page)

1 jpb-1 Woods-direct 32  
2 Q- What do you know of the fee arrangements of the  
3 United Funds, managed in Kansas City?

4 A United Funds is another large complex with  
5 assets, I believe, in excess of \$1 billion. They charge  
6 a fee of one-half of one per cent on the first \$500 million.  
7 It then drops to 45/100ths of assets above \$500 million,  
8 and I am not sure whether there is another step down or  
9 not.

10 Q If I can ask a question to which the answer is  
11 obvious: If the Keystone or National fee formula were  
12 applied to these two funds, is it correct that the excess  
13 cost of the two funds even though aggregated would be about  
14 \$100,000 a year?

15 A Yes.

16 Q I believe you testified earlier, Mr. Woods,  
17 that the Balanced Fund was organized in 1949.

18 A Correct.

19 Q That was the first group of two funds to be  
20 organized?

21 A Yes.

22 Q Could you tell the Court what the investment  
23 policy of the Balanced Fund is?

24 A The Balanced Fund was organized to make the  
25 services of Stein, Inc., Farnham available to investors

jpb-2

Woods-direct

1 who cannot have enough to have an individually managed  
2 account. It was managed and has always been managed  
3 as a complete investment program.  
4

5 By that I mean we have had both stocks  
6 and bonds, therefore the name "Balanced" was used. That  
7 is the way in which the average Stein, Roe & Farnham  
8 account was to be handled. This was to be a complete  
9 account for the person who wanted our services.

10 Q Generally speaking, what does the portfolio  
11 of the Balanced Fund consist of?

12 A Generally speaking, it consists of common stocks,  
13 some long term bonds, and some short term fixed income  
14 securities.

15 Q What, generally speaking, has been the relation-  
16 ship between the common stockholdings and the fixed income  
17 or bond holdings in the Balanced Fund?

18 A The common stock position of the Balanced Fund,  
19 say for the last ten years, has run in the sixty-five to  
20 almost seventy-five per cent range. In other words,  
21 stocks have made up two-thirds to almost three-quarters  
22 of the portfolio of the Balanced Fund.

23 Q Now, the Stock Fund was organized, as I recall it,  
24 some nine years after the Balanced Fund?

25 A 1958.

jpb-3

Woods-direct

Q For what purpose was it organized?

A During those nine years which I recall and I recall discussions, we ran into many people who had fixed assets in the form of pensions, savings accounts, insurance and who really didn't need the fixed income portion of the Balanced Fund. What they needed in their investments to balance their total picture was an all stock fund.

It was to meet this specific need that we decided in 1958 to organize and offer the Stock Fund.

Q What is the investment policy of the Stock Fund?

A The Stock Fund will ordinarily remain essentially fully invested in common stocks and that is usually meant in the 93 to 96 per cent range. some little reserve for buying securities and operations, so forth.

Q Both Funds pay dividends, do they not, to their shareholders?

A Yes, they do.

Q Is it correct that these dividends are simply a passing through of dividends received by the Funds on the securities which they own or interest on fixed income securities?

A The dividends of the -- the ordinary dividends

jpb-4

Woods-direct

1 of the Funds are a pass through of the income the Fund  
2 receives, less the expense of management.  
3

4 The net income is paid quarterly to all  
5 shareholders.

6 Q How does the rate of return using dividend  
7 in that sense of the Balanced Fund compare generally speak-  
8 ing over the last ten years with the rate of return  
9 on the Stock Fund?

10 A The rate of return on the Balanced Fund has  
11 been somewhat higher because that portion of the Balanced  
12 Fund that is invested in fixed income securities in  
13 an income sense has benefited from the higher yields on  
14 bonds as compared to stocks, the Balanced Fund therefore  
15 pays somewhat higher percentage return.

16 Q Would it be correct to say that generally  
17 speaking over the past ten years the dividend rate on  
18 the Balanced Fund has been of the order of 50 per cent  
19 higher than the dividend rate of the Stock Fund?

20 A Yes, of that magnitude.

21 Q I recognize that portfolio managers don't like  
22 the word and that is the word "conservative." But are  
23 Balanced Funds referred to sometimes in the industry as  
24 more conservative investment?

25 A Yes, they are.

jpb-5

Woods-direct

Q What do you understand by the use of that term in that context?

A To me it means that there is less risk to the owner of shares in a Balanced Fund than the risk of owning an all Stock Fund, because while bonds and other fixed income securities may fluctuate in value with changes in interest rates, their fluctuations are generally much less than the stock market, particularly as we witnessed in the last few years.

Q Now, you testified, Mr. Woods, that the Stock Fund was for all practical purposes at all times fully invested in common stocks.

A Yes.

Q And there have been approximately 75 per cent of the assets of the Balanced Funds are ordinarily invested in common stock?

A 75 per cent is usually the maximum. It is somewhat less than that in the Balanced Stock.

Q Is there any similarity between the common stocks held by the Balanced Fund and the common stocks owned by the Stock Fund?

A Yes, there is.

Q What is the extent of that similarity?

jpb-6

Woods-direct

1  
2 A There is a substantial similarity, the reason  
3 being that when Stein, Roe & Farnham finds common stocks  
4 that it thinks are attractive, we think they are attractive  
5 for many of our portfolios and I think it is quite natural  
6 that if we had a stock, be it IBM or Eastman Kodak, we  
7 liked, that we would be inclined to use it in both funds.  
8 We have stated in the brochure that the common stock  
9 portion of the Balanced Fund is similar to the Stock Fund.

10 MR. FRANKEL: What brochure.

11 MR. SCHWARTZ: You can ask him on cross-  
12 examination, if you would like, or if you want to ask him  
13 now. I have no objection.

14 MR. FRANKEL: You mentioned, you stated in a  
15 brochure that the common stock holdings of both corpora-  
16 tions are similar. What brochure are you referring to?  
17 You are not referring to a prospectus, are you?

18 MR. SCHWARTZ: No. It is a document in evidence  
19 Mr. Frankel.

20 A No, there is a brochure which describes both  
21 funds and discusses the difference which we use to send to  
22 a prospective shareholder to try to get him to know what  
23 the funds are like.

24 I am sure it has been submitted in evidence.  
25

THE COURT: Perhaps at a suitable break, Mr. Schwartz can identify for you which exhibit it is.

MR. SCHWARTZ: We are looking for it now. I remember when it was marked at the deposition, but the number is not made here for me. The exhibit is D3.

Q Are the Balanced Fund and Stock Fund investment companies known as no-load funds?

A Yes.

Q Would you tell the Court what a no-load fund is as contrasted with an ordinary investment company?

A A no-load fund is one who shares our offer to the public at net asset value, with no commissions or loading charge or anything added on. In other words, if a shareholder puts a thousand dollars into either of these funds, he is buying a thousand dollars worth of assets. There is no commission.

Q How does the ordinary investment company work as contrasted to a no-load fund?

A Most funds have selling organizations which charge a loading charge, so that you pay asset value, plus that loading charge or commission to buy shares in the fund.

Q Generally speaking, what is the level of the loading charge as is called in the industry?

jpb-8

W. S. direct

A I would say a 7 to 9 per cent range is fair on subscription of modest size. When you get into the six figure numbers, it goes down a little. I would say seven to 9 per cent is the average loading charge.

Q In the case of an ordinary fund, a purchaser who invested \$100, would have \$91 or \$89 going to work for him?

A In that range, yes.

Q As opposed to a no-load fund where all \$100 goes to work immediately?

A Correct.

Q I asked you some questions earlier about Keystone National Securities, United Funds and one other fund complex, Eaton & Howard. Are any of them no-load funds?

A Yes, I think.

Q Which one?

A Eaton & Howard. I am pretty sure.

Q But Keystone is not?

A No.

Q In the case of Keystone in addition to the higher fee, the organization makes a profit presumably on the share of the sales load which it receives on the fund shares?

A That's right.

1 jpb-9

Woods-direct

92 A<sup>40</sup>

2 Q Does Stein, Roe & Farnham make any profit on  
3 the sale of Fund shares?

4 A No.

5 Q Does it receive any compensation for the sale  
6 of Fund shares?

7 A No.

8 Q Is it correct that any shareholders of either  
9 fund has the right at any time to redeem its shares at net  
10 asset value?

11 A That is correct.

12 THE COURT: One moment, please.

13 (Pause.)

14 THE COURT: Before you go on, Mr. Schwartz,  
15 the question and answer before that.

16 (Record read.)

17 BY MR. SCHWARTZ:

18 Q Each fund, Balanced and Stock, has a board of  
19 directors, does it not?

20 A Yes.

21 Q Could you describe the composition of the  
22 board of directors of the two funds? I won't hold you  
23 to specific numbers, generally speaking.

24 A One has 11 directors, I believe, and one 12.  
25 Each fund has three outside directors, people who are

jpb-10

Woods-direct

not affiliated with Stein, Roe & Farnham, Messrs.  
Cooper, Hunter and Jeuck.

Q Who is Mr. Jeuck?

A Mr. Jeuck is spelled J-u-e-c-k, is a professor  
in the graduate school of business at the University  
of Chicago.

Q He has been a director of both funds since  
1969?

A Yes.

Q Who is Mr. Hunter?

A Mr. Hunter is a retired vice-president of  
Inland Steel Company in Chicago. He has been and remains  
active in a number of civic and charitable organizations.

End 3B

2 Q The remaining directors of both funds, are  
3 they partners of Stein, Roe & Farnham?

4 A The third unaffiliated director is Mr. Cooper,  
5 who heads the firm of R. Cooper, Jr., who are large  
6 distributors of appliances.

7 MR. SCHWARTZ: I would like to point out at this  
8 time, your Honor, because I think it is the appropriate  
9 time to do it, that it is stipulated in the pretrial order  
10 that the three outside directors which Mr. Woods has  
11 just identified are neither interested nor affiliated  
12 within the meaning of the investment company act.

13 By definition that means that they are not  
14 controlled, therefore independent in any sense -- not  
15 controlled.

16 Q Mr. Woods, is there in the investment company  
17 industry a generally accepted measure of a mutual funds  
18 investment performance?

19 A Yes.

20 Q Will you describe it, please?

21 A Investment performance in the industry is most  
22 generally measured by comparisons with other funds of  
23 similar types, and there are a number that are well known  
24 and used, such as Wiesenberger, Lipper Study, and we all  
25 spend time comparing our results with those of competition.

1  
2 Q By "results", are you referring to per cent  
3 appreciation or per cent depreciation as compared to  
4 comparable funds over a period of time?

5 A Yes, and really more than just an appreciation  
6 or depreciation, the general yardstick today has become  
7 total ruin, which includes your appreciation, depreciation,  
8 capital gains, and ordinary income.

9 In other words, what have you produced  
10 with these dollars that you are managing?

11 Q I take it you have reviewed and are familiar  
12 with the performance of these two funds as opposed to the  
13 industry as a whole, and other funds with comparable investme  
14 objectives?

15 A Yes.

16 Q Has the investment performance of these two  
17 funds been reported to and reviewed with the three out-  
18 side directors you just testified to on any regular  
19 basis?

20 A It is reported to them in tabular form at  
21 quarterly directors' meetings.

22 Q How does the investment performance of the  
23 Balanced Fund and the Stock Fund compare with the industry  
24 as a whole?

25

pgb-3

Woods-direct

1  
2 A Both funds have had above average records over  
3 an extended period of years compared with the industry.

4 Q You testified, Mr. Woods, that each fund was  
5 managed by Stein, Roe & Farnham, under the management  
6 contract, and you described the management contract  
7 in general terms. How does that contract come into  
8 existence? Who decides for the Fund that it will enter  
9 into a contract or renew it?

10 A Each year we discuss with the outside directors  
11 and then with the full board the record of the fund,  
12 the cost to the shareholders, and an expense study, and  
13 with this information in hand they approve the contract.  
14 It has been approved unanimously by the outside directors  
15 annually and it hasn't been approved by the full board.

16 Q How often does this review by the independent  
17 directors of the management contract take place?

18 A It takes place annually prior to their vote  
19 to go ahead with it. It is done annually.

20 Q Is it correct that in the case of the Stock  
21 Fund the existing contract, with only minor changes from  
22 what it was, then was submitted to and approved by its  
23 shareholders in February of 1968?

24 A Yes.  
25

pgb-4

Woods-direct

1  
2 Q Is it true that in the case of the Balanced  
3 Fund the contract was submitted to and approved by  
4 its shareholders in 1969?

5 A Yes.

6 Q Is it correct that the shareholders of both  
7 funds approved renewal of the contracts in 1972, after  
8 the commencement of this lawsuit?

9 A That is correct.

10 Q You described, Mr. Woods, or identified, an  
11 expense study which is given to each of the independent  
12 directors each year in connection with its renewal of  
13 the management contract.

14 Let me show you Exhibits CK, CX and DK, which  
15 purport to be expense studies for the years '67, '68, and '75

16 Are these the expense studies you alluded to  
17 a moment ago?

18 A Yes, they are.

19 Q Would you describe again in general terms what  
20 these studies contain?

21 A We have been doing these for a number of  
22 years and it starts off with the gross fees received by  
23 Stein, Roe & Farnham from each fund. We then deduct  
24 those expenses paid by Stein, Roe & Farnham that are strictly  
25 attributable to the funds.

pgb-5

Woods-direct

1  
2 They include legal fees that the firm pays on  
3 registrations and so forth, because Stein, Roe & Farnham  
4 pays that rather than having the fund do it -- its printing  
5 and postage that has to do with the fund, includes the  
6 compensation of the fund office personnel who are com-  
7 pensated by Stein, Roe & Farnham and who work solely  
8 on the funds.

9 It includes the rent of the floor space that  
10 is used by the fund office -- all expenses that are  
11 strictly for the fund.

12 We then allocate other expenses of the firm  
13 between the funds and the individual accounts using  
14 as a basis the asset value, so that the expense of the  
15 research department, if the funds are 7 or 8 per cent of  
16 our total assets, pick up that percentage of the total  
17 research which is done for all clients for the firm.

18 Similarly the rent, the fees, other things of  
19 the firm, are allocated on that basis.

20 We get down to a figure that we think is a  
21 fair figure of what the net income from each fund is,  
22 and then to make it comparable with corporations we deduct  
23 what would be the Federal and State taxes and come out to  
24 a net income figure for each fund.  
25

pgb-6

Woods-direct

Q Are those studies given each year to the outside directors before the meeting at which they are to consider the management contract?

A Yes. For a number of years our practice has been to prepare and discuss this material with them at the January directors' meeting, so that they will have plenty of time to ask questions and come back before they are asked at the April board meeting to approve the management contract for the ensuing year.

Q Are these materials you have just described made available at the January meeting?

A They are. There may be a few refinements after that.

In January we still have to make a little estimate of the December expenses, but they are very, very close and at the April meeting they are given the finalized figure.

Q I hand you now Exhibits DO, DP, DQ, DR, DS and DT. I ask you if you can describe in general terms what these are.

A Give me a second, please.

(Pause.)

These are copies of the agenda of various

pgb-7

Woods-direct

1 directors' meetings for both the Balanced Fund and the  
2 Stock Fund. This type of material is submitted to each  
3 director several days prior to the directors meeting so  
4 that he has a chance to study the things that he will  
5 be asked to act on at the directors' meeting.  
6

7 Q In addition to the agenda, what kinds of  
8 materials are included in the package which each director  
9 gets?

10 A It includes, first, a recommendation for the  
11 quarterly dividend backed up by financial data showing the  
12 earnings; it includes the record of subscriptions and  
13 redemptions to the Fund and of investment performance;  
14 it shows the portfolio changes in detail, stock by stock,  
15 that were made in the preceding year.

16 That is following by an analysis of the reasons  
17 for the transactions.

18 In the case of the Balanced Fund, it includes  
19 a page on fixed income securities, what has been done in  
20 that area and the reasons for it.

21 If it is the meeting where the advisory agreement  
22 is to come up, it includes a copy of the proposed agreement.  
23 It includes the minutes of the preceding directors'  
24 meeting, and then either with this or at the meeting the  
25

pgb-8

Woods-direct

1  
2 directors are given a comparative performance study compar-  
3 ing our funds with others. That is sometimes not  
4 ready until the final meeting, but this is prepared for  
5 each meeting, quarterly.

6 Q You have read the complaint in this case, I  
7 take it?

8 A Yes.

9 THE COURT: The amended complaint?

10 THE WITNESS: Yes.

11 Q You are aware, are you not, the plaintiffs  
12 contend that for purposes of computing the fee, the assets  
13 of the two funds should be aggregated, or the two funds  
14 should be merged, so that their assets would be aggregated  
15 for the purpose of calculating the fee.

16 YOU are aware of that?

17 A I am aware of that.

18 Q Let me ask you to make an assumption.

19 I ask you to assume that the Balanced Fund and  
20 the Stock Fun- can be merged, so that you have one corpora-  
21 tion instead of two.

22 And you are able to do so in such a way that  
23 the respective identities of the two portfolios,  
24 the Stock Fund and the Balanced Fund, are preserved.

25

pgb-9

Woods-direct

A      YOu mean we would have two portfolios within  
a single corporation?

(continued on next page.)

End 4A

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4/14/76  
PM 4b

1 pgmch

Woods-direct

103A 51

Q Yes.

Assuming, for the moment, you could do that, what, if anything, would be the savings to the shareholders of the two Funds if you did that, apart from the management fee? Leave the management fee aside for the moment.

A I think they would be minimal because I would assume each portfolio, each Fund itself, would have to be registered with the SEC, with all the states, and we would have to do all the accounting, so having them under one "umbrella," so to speak, I don't think would make much difference.

Q I am going to ask you to make another assumption, Mr. Woods.

Let's assume instead of assuming a merger I just asked you to assume you left things as they were, as far as corporate structure is concerned, but the management contracts provided instead that for the purpose of calculating the fee of the two Funds the assets would be aggregated.

Do you understand my question so far and what I am asking you to assume?

A Yes.

Q If that were done, would there necessarily be any reduction in the management fee payable by either Fund?

2 pgmch

Woods-direct/cross

1  
2 A I feel sure there would not be, because we  
3 would suggest that the contracts be changed and we would  
4 have a higher break point on the fees.

5 We look at the total dollars we are getting  
6 for managing these two Funds and what we thing we  
7 are making from them, and that's the important step to  
8 me in starting forward, not how you allocate.

9 MR. SCHWARTZ: I have no further questions.

10 THE COURT: You may inquire.

11 CROSS-EXAMINATION

12 BY MR. FRANKEL:

13 Q When Balanced Fund first started, did it have  
14 the step down in the management fee?

15 A No. It did not. It was a straight half of  
16 1 percent.

17 Q Can you tell us how the step down of the manage-  
18 ment fee came about?

19 A Yes.

20 It was not even considered when we started  
21 because it was so small. As the Fund grew and it  
22 approached -- it was approaching \$100 million, which would  
23 be in the early 1960s; I can't give you the exact date --  
24 it seemed to us, the partners at Stein, Roe & Farnham,  
25 the advisor, that there were some economies when a Fund

1 3 pmch

Woods-cross

2 becomes larger, and we, ourselves, went to the shareholders  
3 and suggested that when the Fund passed \$100 million,  
4 the assets over that level be billed at .4. That's the  
5 way it happened.

6 Q In other words, there is a reduction in your  
7 expense, and therefore you are willing to take some  
8 reduction in your fee; is that correct?

9 A Yes. In that corporation, yes.

10 Q You mentioned certain investment management  
11 companies that managed more than one fund.

12 Do you know whether in any of those cases the  
13 two funds or more with a common management are very  
14 similar or are very dissimilar?

15 Can you think of any where the funds are very  
16 similar?

17 A I have not studied the portfolios enough  
18 to say taht here are two that are very, very similar. I'm  
19 just not --

20 Q Isn't it true in the Keystone group of funds  
21 each fund is different to a very large extent?

22 A They do have different funds, yes.

23 Q And isn't it true also that Eaton & Howard  
24 has different funds, different industries, even?

25 A They have a balanced and a stock fund.

4 pgmch

Woods-cross

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Q Have you ever compared the stock holdings of their balanced fund and the stock holdings of their stock fund?

A I have not made a detailed comparison.

Q In addition to the investment management companies that you already have told us about, are there any other companies that you know of that manage more than one fund?

A Yes.

Q Such as?

A Scudder, Stevens & Clark, T. Rowe Price.

Q Do any of those, as far as you know, aggregate the assets of more than one fund or the stock holdings of more than one fund when they compute their fee?

A I believe they do not.

Q Are you telling us there are none that make this aggregation?

A The ones that we have discussed are the ones that I'm aware do make the aggregation.

Q Did you say do or do not make?

A The ones mentioned before, such as Keystone, United, Eaton & Howard, and National, are the ones where I am aware that they do aggregate. It is my clear understanding these others do not. I can't say that there

1 5 pgmch

Woods-cross

2 is not another complex in the country.

3 Q Would it be accurate to say, so far as you know,  
4 that sometimes when there are two or more funds under  
5 joint management, the fees are figured on the aggregate  
6 of the funds, and sometimes they are not? Is that  
7 accurate?

8 A Sometimes.

9 Q Aren't your services, so far as stock invest-  
10 ments are concerned, almost exactly the same to Balanced  
11 as the Stock Fund?

12 A When we do our research to select attractive  
13 securities, we are really working for all of our clients  
14 and if we find attractive industries or attractive  
15 securities we will use them broadly.

16 It would be impossible to construct portfolios  
17 and have each person have a different group of stocks.  
18 If you have your favorites they're your favorites, and I  
19 think you would be hurting your shareholders of one fund  
20 if you didn't put them in.

21 Q Actually, don't you make virtually the same  
22 stock recommendations to both Funds, and aren't their  
23 orders carried out together so you don't have one Fund  
24 competing with the other?

25 A We look at each Fund separately, depending on

1 6 pgmch

2 what cash it has to reinvest, whether it's had a recent  
3 cash addition, and so forth, and we then make a recom-  
4 mendation that we think is appropriate for that Fund;  
5 and it is true, if we started to buy a security newly  
6 added to our list, we would try maybe to put in a joint  
7 order to get a better execution for shareholders of both  
8 Funds.

9 Q I'm just looking at what we have already put  
10 in the pretrial order by agreement.

11 Isn't it true that 86 percent of the total  
12 investment of Stock Fund is the same securities as  
13 constitute 71 percent of the total investment of Balanced  
14 Fund?

15 A I can't attest to the exact accuracy of those  
16 figures, but there is, I know, and has always been by  
17 design, a great similarity between the Stock Fund and  
18 the stock portion of the Balanced Fund.

19 Q You don't have one Fund buy one week and the  
20 other Fund buy next week, do you? They buy together?

21 A They buy at the time that the Fund investment  
22 committee decides to go ahead. We don't favor one Fund  
23 over another.

24 Q Isn't it true --

25 MR. SCHWARTZ: Have you finished your answer?

1  
2 A Yes.

3 Q Isn't it true in most cases the purchase orders  
4 for the two Funds are handled together?

5 A The purchase orders, there would be separate  
6 purchase orders for each Fund. There would be other  
7 orders for other clients of the firm.

8 These orders are all submitted to our own trading  
9 desk manned by six people and a partner of the firm.  
10 They look at these orders and if possible they would try  
11 to lump them to get the best execution for all of our  
12 plans.

13 Q And then you allocate it among your customers?

14 A We don't buy and then allocate. We place an  
15 order knowing that we want so many for this account and so  
16 many for that account and so many for the third.

17 Q You have allocated before you put the order in?

18 A He knows he has 22,000 share to buy and he knows  
19 where he wants them to go.

20 Q Isn't it true that a majority of the boards of  
21 each of the Funds are directors who are affiliated with  
22 Stein, Roe & Farnham?

23 A Correct.

24 Q Hasn't that always been the case?

25 A Yes.

1  
2 Q Before this action was commenced in '72, was  
3 there any discussion in the board of directors meeting of  
4 either Fund as to the possibility of reducing the  
5 management fee by insisting on aggregating the assets before  
6 the step down took place?

7 A I don't recall any such discussion.

8 In each Fund it was the firm and the directors who  
9 went to the shareholders and suggested the reduction in  
10 fee when we got close to \$100 million, and we thought these  
11 fees and total costs were very fair and we never discussed  
12 aggregating.

13 Stein, Roe & Farnham operates at a profit, does  
14 it not?

15 A Yes.

16 Q Can you tell me whether the services that you  
17 render to the two Funds in question are profitable or whether  
18 you perform those services at a loss? Can you tell me?

19 A They are profitable according to our expense  
20 studies and the profits seem to us to be kind of modest.

21 MR. FRANKEL: I have no questions.

22 THE COURT: Any redirect?

23 MR. SCHWARTZ: No redirect, your Honor.

24 THE COURT: You may step down.

25 (Witness excused)

MR. SCHWARTZ: I would like to apologize to the Court. We have two more witnesses but they are en route from Chicago at the moment. I had no idea we would be finished this quickly.

My direct examination for each of them will be five minutes.

THE COURT: Have you a rough estimate when they will be here?

MR. SCHWARTZ: They won't be here until 7:00 o'clock tonight. They left at 4:00 or 5:00.

We will be ready to begin bright and early in the morning and be finished before lunch.

I apologize for not having them here earlier.

THE COURT: I was about to take a few minutes recess anyhow.

We will resume in the morning at 10:15.

(Adjournment taken to April 15, 1976 at 10:15 a.m.)

pgb-1

Charles R. Wolfson, et al

vs.

72 Civil 2238

R. Douglass Cooper, et al.

New York, New York.  
April 20, 1976- 10:20 A.M.

(Trial resumed.)

THE COURT: Good morning.

Mr.Schwartz, what is your wish?

MR. SCHWARTZ: I call Mr.R. Douglass Cooper  
to the stand.

R I C H A R D D O U G L A S S C O O P E R, called  
as a witness by the defense, having been first duly  
sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCHWARTZ:

Q What is your occupation?

A I am president of R. Douglass Cooper, Inc.

Q What kind of merchandise does the company  
distribute?

A Appliances, television and other miscellaneous  
items.

pgb-2

Cooper-direct

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2

Q Where do you live?

3

A Winetka, Illinois.

4

5

Q Tell us something in general terms about the size of the company.

6

7

8

A The volume of our business is something in excess of \$20 million a year in terms of dollars, and we have warehouses, offices, and a branch in Peoria, Illinois.

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End 1A 22

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Q Are you a director of the Balanced Fund?

A Yes.

Q And of the Stock Fund?

A Yes.

Q Have you been a director since 1969?

A That's correct.

Q Are you now or have you ever been a partner or an employee of Stein, Roe & Farnham?

A No, I have not.

Q Do you or your company own any shares in either of the funds?

A I own shares in the fund and our profit-sharing plan in our company also has money invested in the fund.

7/15/76  
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1 pgmch

Cooper-direct

1  
2 THE COURT: You own shares in each of the  
3 Funds?

4 THE WITNESS: Personally.

5 THE COURT: And your profit-sharing plan also  
6 owns --

7 THE WITNESS: Our profit-sharing plan has  
8 their money invested in the Stock Fund and in addition  
9 the Capital Opportunities Fund, which I have no connection  
10 with.

11 Q What is the approximate dollar value of the  
12 holdings of the profit-sharing plan in the Stock Fund?

13 A Approximately \$300,000.

14 Q As the director of the two Funds, you, during  
15 the course of the year, review documentary material relating  
16 to the business of the Funds furnished to you by Stein,  
17 Roe & Furnham?

18 A Do I do what?

19 Q Do you review documents?

20 A I review the Funds, yes.

21 Q Could you describe to the Court in general  
22 terms what the nature of the documents is that you review?

23 A As a director of the Funds I review the  
24 prospectuses, the stock reports, all reports that go  
25 out to the public.

2 pgmch

Cooper-direct

1  
2 We also review the costs and the materials  
3 submitted to us by Stein, Roe & Farnham with reference  
4 to the operation of Stein, Roe & Farnham and the  
5 justification of their operation with us; and as an indepen-  
6 dent director I am constantly reviewing the Funds'  
7 operations.

8 (Continued on next page)  
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1 jpmch Cooper-direct

2 Q Before each meeting of the board, do you receive  
3 a sheaf of document relating to the business to be  
4 transacted at that meeting?

5 A Yes, we do. They are mailed to us.

6 Q What, in general, are the subject matters  
7 covered in the documents sent to you before each meeting?

8 A Generally before each board meeting the infor-  
9 mation that we receive has to do with the operation of  
10 the Fund, the relative position of the holdings, the  
11 determination of any dividend, or action that we have to  
12 take at that meeting, and the general things that come up  
13 in the operation of the two Funds.

14 Q Do you regularly receive materials showing the  
15 expense performance of the Fund in relation to other funds?

16 A Yes, we do. We regularly -- we do receive  
17 other funds' information that gives us a comparison of  
18 what our cost and operation of the Stein Roe Funds is.

19 Q Do you receive information with respect to the  
20 investment performance of a Fund?

21 A Yes, we do.

22 Q How often do you receive it?

23 A We receive the investments quarterly.

24 Q Mr. Cooper, do you understand that as an  
25 unaffiliated or outside director of the two Funds you have

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Cooper-direct

2 a particular duty under the Investment Company Act with  
3 respect to the management agreements between the two Funds  
4 and Stein, Roe & Farnham?

5 A Yes, I do. The independent directors are  
6 responsible for the renewal of a contract as it comes  
7 due, and it is our responsibility to see that the expenses  
8 are justified in our opinion.

9 Q How often to the three unaffiliated or outside  
10 directors consider the contracts?

11 A Yearly.

12 Q Do they vote upon the contract yearly?

13 A Yes, we do.

14 Q Has the contract been approved each year since  
15 1969 by all three of the unaffiliated directors?

16 A That's correct.

17 Q In considering the management contracts each  
18 year, what factors do you personally take into account?

19 A We have a submission from Stein Roe of the  
20 costs that they show in the operation of the Fund, which  
21 we review, and we do this prior usually to the board  
22 meetings.

23 As we review this, we also look into the  
24 general operating costs of all funds similar to ours that  
25 are listed by services such as Lipper, to see that the

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Cooper-direct

percentages of costs are comparable. We feel we are usually on the low side or median of all funds in the United States.

In addition to this, the review of this, in requesting that we would feel was excessive, and of course I personally feel that the Funds are extremely well managed and done on a very economical basis.

THE COURT: On that question, if the assets of the two Funds were aggregated, if the Stein, Roe & Farnham fees were approached in that fashion, on an aggregated basis, would it equal the combination of the Stein, Roe & Farnham fees presently charged on the non-aggregated basis presently?

THE WITNESS: It would be my opinion, from any experience I have in my own business, and the only reason I relate this is that we do run each department separately in my own company. I have been in business all my life. I have had all sorts of propositions in my own company that was brought to me, and it would be my opinion to combine these fees the chances are just as good that the costs would be higher.

THE COURT: Let me ask you some other questions --

If you don't mind --

MR. SCHWARTZ: No.

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Cooper-direct

THE COURT: You are not up to this, and maybe you plan to get to it.

Stock Fund holds no interest in bonds; is that correct?

THE WITNESS: That's correct.

THE COURT: Both the Stock Fund and the Balanced Fund have significant holdings in common stocks; is that correct?

THE WITNESS: Correct.

THE COURT: Can you estimate the percentage of common stocks held in common by Balanced Fund and Stock Fund? In other words, to what extent would you say each of the Funds, by virtue of advice received from Stein Roe, is holding common stock which is common to each of them, that is, from the same corporation?

THE WITNESS: No, I wouldn't be able to give you a percentage. In other words, I could say that they are quite similar in the stocks.

THE COURT: We have had a little bit of that already. I think in the pretrial order there was some reference to it.

Would you give that some attention before you conclude?

MR. SCHWARTZ: They are substantially the same,

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Cooper-direct

2 your Honor.

3 THE COURT: Substantially the same.

4 THE WITNESS: That's correct. You asked me  
5 the percentage.

6 MR. SCHWARTZ: There is no dispute as to that.

7 THE COURT: Go ahead, Mr. Schwartz.

8 MR. SCHWARTZ: I have just one more question,  
9 your Honor.

10 Q If the assets of the two Funds were aggregated  
11 for purposes of computation of the fee, would the fee  
12 formula now provided for in the contracts necessarily  
13 remain the same?

14 A No.

15 Q Why not?

16 A Well, I don't know how much you want me to go  
17 into this, but I believe if they were combined and we had  
18 to go to Stein Roe, or say our duty was to get someone  
19 else to do the fees, I believe they would be, chances  
20 are, they would be at least the same and perhaps higher.

21 The reason for this, in my opinion, is that  
22 the research and the things we get from Stein Roe, who  
23 incidentally handled many other investments besides our  
24 own, we are getting the benefit of a complete organization.  
25 If you just define why are they doing this research or

1 6 jpmch

Cooper-direct

2 that research, it is the total result we get from the  
3 Stein Roe firm that we're talking about, the total cost.

4 So, if we did change the fee schedule, I  
5 would think that it is a possibility that it would result  
6 in a higher fee. Obviously, when you break the  
7 fee down and come up with the profit that the firm actually  
8 makes, I personally would not -- I know that it wouldn't  
9 be prudent for any other management group to handle it  
10 at that little profit.

11 MR. SCHWARTZ: I have no further questions.

12 (Continued on next page)

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Cooper-cross

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THE COURT: Mr. Frankel.

3

CROSS-EXAMINATION

4

BY MR. FRANKEL:

5

Q Can you tell us how you happened to be nom-

6

inated as a director of the funds?

7

A Yes. I was asked to go on the board of

8

Stein, Roe by one of the partners and I decided that I

9

would consider doing this. At the time I went to the

10

two former directors that were formerly on the board.

11

I went to their office and asked their opinion and whether

12

they felt I would make a contribution to Stein, Roe. They

13

said that I certainly would, and they would recommend

14

that I take the position as a director of Stein, Roe.

15

Prior to that I have had a connection, I

16

have known the principals of Stein, Roe for the last over

17

20 years.

18

In my business I have been consulted prior to

19

this by Stein, Roe in terms of asking my opinion and I have

20

talked to some of their analysts about the industries

21

that I was familiar with at no compensation.

22

In other words, this had gone on for some 20

23

years.

24

Q Could you tell us which of the partners in

25

Stein, Roe you are particularly well, acquainted with?

1 jpb-2

Cooper-cross

2 A That I am particularly well acquainted with?

3 Q Yes, you said you have known some for 20

4 years.

5 A Jim Stein, John Title, and I know most of the  
6 partners. I don't know what you mean by --

7 Q All right. Which one asked you to go on the  
8 board?

9 A John Title.

10 Q Are you familiar with the profits that Stein,  
11 Roe makes each year?

12 A No, I am not.

13 MR. SCHWARTZ: That is overall, Mr. Frankel?

14 MR. FRANKEL: First, overall.

15 A No, I have no actual --

16 Q No way of knowing?

17 A To my knowledge, I have no access to that  
18 information.

19 Q Now, if you run the funds the same as they are  
20 run today with the same management and the same advisors,  
21 but the fees are figured on an aggregated basis, with  
22 a step down after the first \$100 million, wouldn't there,  
23 as a matter of arithmetic, be reduction of fees of \$100,000  
24 a year?

25

jpb-3

Cooper-cross

A As a matter of arithmetic?

Q Yes, sir. I said, "if."

A Well, that is a conjecture. I really wouldn't be able to answer that.

Q Well, isn't it just a matter of arithmetic that if you step down at the end of 100 million instead of at the end of 200 million, you save one-tenth of one per cent of 100 million which is \$100,000?

A The arithmetic is correct.

Q Now, is there any reason known to you why the management couldn't stay the same and the investment advisor stay the same, but the assets be aggregated with a computation of fees under the existing formula of a step down at the 100 million point?

A Certainly. It can't be done in my opinion.

Q Why can it not be done in your opinion?

A I believe that we are talking in terms of the management and the people concerned at Stein, Roe. That gets into the problem of their having the best available people and paying the current going rate.

We have the advantage of the firm in terms of the operation. But when you get into this saying "arithmetical," that isn't possibly true in any business I was in. I think the Judge asked me that. I

1 jpb-4

Cooper-cross

2 don't believe that if you just start talking arithmetic,  
3 all arithmetic, 2 and 2 can always make 4. However,  
4 when you get into what the cost of our hiring a firm, which  
5 was if I was an independent director would be, I think  
6 that the fees are reasonable, in fact from any record  
7 that I can see that they are less, and if we went back  
8 to reconsider, say combining, you wouldn't just have  
9 an arithmetical progression to get to the same fee.

10 THE COURT: I am not sure I understand, Mr.  
11 Cooper. Assuming for the moment that fees are  
12 reasonable.

13 THE WITNESS: Correct.

14 THE COURT: What I understand Mr. Frankel to be  
15 asking, if you left the management arrangement the same,  
16 staffing arrangement the same, everything the same except  
17 for one thing, change the fee arrangement from one that is  
18 presently the result of two different contracts with the  
19 Stein, Roe and convert it to a single contract predicated  
20 upon the aggregation of assets.

21 What would be, at least, the arithmetic situation  
22 that would result as far as you can determine?

23 THE WITNESS: Well, perhaps I made my answer  
24 not clear. The point being if we went back to Stein, Roe  
25 and say we are not combining -- or any other management

1 jpb-5

Cooper-cross

2 company -- we would be reconsidering a complete new  
3 method of figuring in the cost of the operation of their  
4 fund and what they would have to charge us might necessarily  
5 be higher.

6 THE COURT: Well, that is an answer. That is  
7 an answer.

8 I think the question is looking at from the  
9 point of view of the funds, Balanced Fund and Stock Fund.

10 What would be the result to the two funds in  
11 terms of the kinds of fee that would result from a single  
12 management consulting, counseling compound.

13 That is rather from Stein, Roe. Stein, Roe  
14 might come back and say there are all kinds of reasons we  
15 are not charging more.

16 But looking at it from the funds' point of  
17 view, what would you have to say about that?

18 THE WITNESS: Well, my point being that if you  
19 are talking just about the arithmetic, that would be  
20 a result.

21 But we don't know until we would combine the  
22 funds and ask someone to give us a fee, whether it would  
23 be a savings. My considered opinion is it would be  
24 higher.

25 THE COURT: Your point is well taken. We

jpb-6

Cooper-cross

1 have not given you an essential factor in this hypothetical,

2 Counsel, you would have to take some of those  
3 percentages that were mentioned yesterday with reference  
4 to some of these other comparable management consultant  
5 firms which use the aggregate method.  
6

7 Perhaps you can weave it into a hypothetical.  
8 In other words, you know what his charge more or less is.  
9 That is, you charge what the range is charged by other firms  
10 doing work that is similar to Stein, Roe.

11 THE WITNESS: Correct. Practically every  
12 one we studied there is a break point of funds.

13 MR. FRANKEL: May I continue, your Honor?

14 THE COURT: Yes.

15 BY MR. FRANKEL:

16 Q You did not hear Mr. Woods testify yesterday,  
17 did you?

18 A No.

19 Q Did you read the daily transcript of his  
20 testimony?

21 A No.

22 Q Well, can you tell us, if you know, what the  
23 reason is for the step down? In other words, the  
24 decline in the rate that you pay for the investment advisor  
25

jpb-7

Cooper-cross

and other services of Stein, Roe once you reach \$100 million in each fund?

A Why that comes about?

Q Yes.

A The fee drop, as you study all funds, you find this to be a common denominator, whether it is Scudder or any fund that I ever read about. My experience in management, we have been giving solum discounts to our customers for 45 years.

A lot of it becomes the trade practice in our business and this is a common thing in the investment field which is a relatively new art that is going back to the early fifties.

It is a customary matter and any fund that we would ever go to -- let's say just arbitrarily, I would say I am taking this some place else, I can read and see that their fees are all set up the same and I might choose to put one fund with one advisory service, and one with another.

If I were just going out for that.

You asked how that came about.

I can't tell you how the industry evolved this way, but I can tell you the whole industry is set up that way.

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Cooper-cross

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Q In other words, the second hundred million is handled at less expense than the first 100 million and therefore the customer receives a volume discount, is that correct?

A No.

Q What is the reason for the volume discount?

A I am only saying to you that it is not just necessarily that second hundred million.

Q I withdraw that question.

In the case of each of the two funds that we are talking about, the parties, including the investment advisor, have agreed that there will be a smaller fee on the second hundred million than there is on the first hundred million, that is true, isn't it?

A That is absolutely right.

Q Isn't that because the expense of handling the second hundred million is slightly less than the expenses connected with the first hundred million?

A No.

Q You mean the expenses remain absolutely the same for the second hundred million?

A You see, when you get into that you are getting into a business I know a lot about in terms of my own. You put an invoice through for a certain cost. It does

pgb-2

Cooper-cross

not make any difference whether that customer has purchased \$10,000 from you or 100 million. All the transaction costs run the same.

In the aggregate cost of running the business instead of going back to the first transaction we customarily say, "When you reach a given volume we give a rebate or a lower cost," not because the additional volume is there, but in terms of the total transaction with us.

Q Let's get away from the business you know about.

A This is all I can go by, because all funds have a reduced fee that I have ever seen, so the only thing I can justify it on is my own experience.

Q You would say that that reduction is not because of a reduction in cost applicable to the amount, the higher amount?

A Not in any business I know about.

Q Let's concentrate on the fund business.

As you know, the investment advisor, the manager, doesn't sell anything the way you sell appliances. He just gives advice somewhat the way a lawyer or accountant does, isn't that true?

A Advice?

Q Yes. And service.

pgb-3

Cooper-cross  
redirect

A That is more like it.

The services you are involved in.

Q These services do not materially increase in cost to the person giving it whether he is rendering the service with reference to 100 million or with reference to 200 million, do they? Certainly it is not twice as expensive to produce for 100 million as to provide for 100 million?

A You are telling me that. I don't know that.

Q That is an answer that precludes further inquiry. Now, you said, if I heard you correctly, you are a director of Stein, Roe, Farnham, is that correct?

A The Balanced Fund and the Stock Fund. I do. recall how the question was asked. I am not a director of Stein, Roe.

MR. FRANKEL: No further questions.

THE COURT: Any redirect?

MR. SCHWARTZ: Briefly, your Honor.

REDIRECT EXAMINATION

BY MR. SCHWARTZ:

Q You testified on cross-examination that you had known some partners in Stein, Roe & Farnham prior to joining the boards of the funds, is that correct?

pgb-4

Cooper-redirect

1  
2 A That is correct.

3 Q Had you ever received any compensation of  
4 any sort from Stein, Roe & Farnham prior to becoming a  
5 director?

6 A None whatsoever.

7 Q Could you tell us once again what the nature  
8 of that prior relationship was?

9 A In terms of the relationship prior to that,  
10 in some detail, it so happens that for about 25 years  
11 Jim Stein and I rode down the train together and  
12 had discussions in terms of all types of business. It  
13 involved particularly television 20 years ago. I had  
14 some very strong opinions about what I thought was  
15 going to happen to the industry, which was to the contrary  
16 to what other people thought, and at that time they  
17 invited me into a luncheon with the analysts of those  
18 departments to give my opinion of that industry.

19 That was one example of what I did. There  
20 was no compensation and it was strictly on the basis of  
21 their consulting me because they respected my knowledge  
22 in that business.

23 I had no interest other than that in Stein, Roe,

24 MR. SCHWARTZ: I have no questions.

25 THE COURT: Call your next witness.

pgb-5

Hunter-direct

(Witness excused.)

LEMUEL B. HUNTER, called as a witness  
by the defense, being first duly sworn, was examined  
and testified as follows:

## DIRECT EXAMINATION

BY MR. SCHWARTZ:

Q Where do you live, Mr. Hunter?

A In Winetka, Illinois.

Q What is your present occupation?

A I am a retired vice-president of the Inland  
Steel Company.

Q When did you retire from the Inland Steel  
Company?

A March 31, 1969.

Q Did you have any particular responsibilities  
as vice-president of the company?

A Yes.

At the time I retired I was vice-president in  
charge of administration, and in that capacity I was  
responsible for the annual report for the personnel  
functions for the Inland Steel Ryerson Foundation, and  
various other lesser responsibilities.

Q Have you been a director of the Balanced Fund

1 pgb-6 Hunter-direct

2 and of the Stock Fund since 1969?

3 A Yes.

4 Q Tell us what your educational background is.

5 A I went to Harvard College and had no graduate  
6 work of any sort.

7 Q Are you currently the chairman, or are you  
8 one of the founders, or the founder, of the Urban  
9 Dynamics Intercity Fund?

10 A Yes.

11 (continued on next page.)

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2 Q That is located in Chicago?

3 A Yes.

4 Q Could you tell us briefly what it said?

5 A Well, it brings together a pool of contributions  
6 by people of modest means or family foundations who want  
7 to try to help organizations which are just getting started  
8 in the inner city, which are not, because they have no  
9 record performance as yet, in a position to go to some of  
10 the more established giving units, like the Community Fund  
11 or the Chicago Community Trust, and our staff investigates  
12 these organizations and then we give them, if we think they  
13 deserve it, modest amounts of money and technical assistance  
14 in preparing budgets, preparing grant requests to foun-  
15 dations, and other giving sources.

16 It's a sort of risk venture to try to help  
17 organizations get started. Sometimes a rather small amount  
18 of money can help them get going or keep them alive until  
19 they can begin to get money from other sources and carry on.

20 Q Were you president from 1962 to 1965 of the  
21 Welfare Council of Metropolitan Chicago?

22 A Yes, I was.

23 Q Are you now, or have you ever been, a partner  
24 or an employee of Stein, Roe & Farnham?

25 A No.

2 pgmch

Hunter-direct

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2 Q As a director of the two Funds, do you receive  
3 and review documentary material with respect to the  
4 business of the Funds?

5 A Yes.

6 Q Could you describe briefly the nature of  
7 the materials you review?

8 A Before each quarterly board meeting we get a  
9 report of the operations of the Funds during the preceding  
10 quarter with a report on the earnings and a recommendation  
11 for dividends to be paid.

12 We get a report of the purchases and sales.

13 We also get monthly inventories of the holdings  
14 of the two Funds.

15 We get preliminary copies of proxy statements  
16 for the annual meeting, of quarterly and annual reports  
17 to the stockholders of revisions to the prospectus, of  
18 SEC reports, and in general quite a good deal of material  
19 that tells us what the Funds are doing and what their  
20 records are.

21 Important among them are comparative cost  
22 reports which show how these two Funds are doing as compared  
23 with other funds managed by other investment counsel, and  
24 also records of changes in the asset value over varying  
25 periods, as compared with the records of other funds.

3 pgmch

Hunter-direct

Q How does the expense performance of these two Funds compare with others in the industry?

A Very favorably.

Q How does the investment performance of these two Funds compare with others in the industry?

A Also very favorably; well above average.

Q Among the materials which you review, do you review statements which show the profit to Stein, Roe & Farnham derived from the management of the two Funds?

A Yes.

Q Mr. Hunter, do you understand that an outside director or "unaffiliated director," as the term is sometimes used, that in that function you have a particular responsibility under the Investment Company Act?

A Yes.

Q With respect to the management contracts?

A Yes, I do.

Q What is that responsibility as you understand it?

A Well, the management contract between the two Funds and Stein, Roe & Farnham does for a year at a time. It's reviewed annually and it is renewed only if a majority of the outside directors approve it. So, as a group, the three of us have the right to approve or to

1 4 pgmch

Hunter-direct

2 block the approval and continuance of the management  
3 contract.

4 Q You understand that the three of you, and the  
5 three of you alone, have the right to renew or reject that  
6 contract?

7 A Yes. It cannot be continued without our approval.

8 Q How often do you consider the renewal of that  
9 contract?

10 A Annually.

11 Q Could you tell us what factors you take into  
12 account in considering the renewal of that contract?

13 A Well, I should say, first, the ability and  
14 integrity of the managers, the members of the firm of  
15 Stein, Roe & Farnham, many of whom we know and see at the  
16 board meetings, and, secondly, the factors that we talked  
17 of a moment ago, the cost comparisons and the performance  
18 comparisons with other funds managed by other investment  
19 counsel.

20 So it's important to me to feel that our  
21 shareholders are being well served by Stein, Roe & Farnham  
22 in the management of these Funds, and I do believe that.

23 Q Do you have an opinion about the competence  
24 and integrity of the Stein, Roe & Farnham personnel who  
25 handle the affairs of the Funds?

1 5 pgmch

Hunter-direct

2 A Yes. I think that all of the ones that I know  
3 are men of integrity and ability.

4 Q You were in the courtroom, were you not, when  
5 Mr. Frankel asked Mr. Cooper how he came to become a  
6 director of the Funds?

7 A Yes.

8 Q How did you happen to become a director?

9 A I was asked by Mr. Harry Hagey, who was at  
10 that time president and now chairman of the boards of the  
11 two Funds.

12 Q How would you know Mr. Hagey?

13 A I first became acquainted with him when he was  
14 chairman of the budget committee of the Chicago Community  
15 Fund and I was president of the Welfare Council. The  
16 Council gets an important part of its annual funding from  
17 the Community Fund and, that being the case, as an  
18 officer of the Welfare Council, I knew the chairman of  
19 the budget committee from year to year, and I knew Mr.  
20 Hagey in that capacity.

21 Q Did you have any contact with him other than  
22 in this community work?

23 A No, not up to that time. That was my first  
24 acquaintance with him.

25 Q I have one other subject to cover with you,

1 6 pgmch

Hunter-direct

2 Mr. Hunger, and then you go home after Mr. Frankel  
3 is finished.

4 If the assets of the two Funds were aggregated  
5 for purposes of computing the fee, would the present  
6 formula, the formula presently provided for in the two  
7 contracts, necessarily remain the same?

8 A No.

9 Q Why not?

10 A Well, at present the formula that is in effect  
11 yields a return to Stein, Roe & Farnham of \$1,394,000.

12 Q Is that gross or net?

13 A That's gross. That's the fee.

14 If the two Funds were combined, the application  
15 of this same formula would result in a payment of  
16 \$1,300,000, or \$94,000 less.

17 When you take the amounts of net income to  
18 Stein, Roe & Farnham of the two Funds for 1975, it came  
19 to, as I remember, \$125,000, and if you were to deduct  
20 the \$94,000 fee income from the \$125,000 net that they  
21 received, you would get a pretty low figure.

22 I doubt seriously that Stein, Roe & Farnham  
23 or any other investment counseling firm would be willing  
24 to perform the services for that small amount of net income,  
25 so if we directors were to consider the services of Stein,

7 pgmch

Hunter-direct

Roe & Farnham or anybody else, I think we would necessarily have to negotiate a higher return than would result from the application of this formula to the combined assets of the two Funds.

MR. SCHWARTZ: I have no further questions.

(Continued on next page)

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Hunter-cross

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2 CROSS-EXAMINATION

3 BY MR. FRANKEL:

4 Q Is a Mr. Hagey to whom you referred connected  
5 with Stein, Roe & Farnham?

6 A I think he is in retirement or semi-retirement,  
7 but, yes, he was for years a partner in Stein, Roe &  
8 Farnham.

9 Q And after you first met him, but before you  
10 became a director of the Funds, did you come to know Mr.  
11 Hagey pretty well?

12 A Not intimately, but well.

13 Q Now, how did you determine that the Stein  
14 Roe profits on these two Funds is only approximately  
15 \$125,000?

16 A Well, I added up the figures on the reports  
17 that are submitted to me.

18 Q In other words, Stein Roe reports to you as  
19 to what their expenses are in connection with the two  
20 Funds?

21 A Yes.

22 Q You took those expenses and subtracted them  
23 from the fee which you knew?

24 A Yes. Well, the report includes all of these  
25 figures and the net income to them.

1 2 jpmch

Hunter-cross

2 Q You are aware of what we mean by a fiduciary,  
3 are you not, sir?

4 A Yes. I'm not a lawyer so I don't know what --

5 Q What is your understanding of the word "fiduciary"?  
6 What does it mean?

7 A I think it means I have an obligation of  
8 trust to the people I serve.

9 Q Exactly. A very good definition.

10 Would you say that Stein, Roe & Farnham is  
11 a fiduciary as far as the two Funds are concerned?

12 A Well, they are an employee of the two Funds.  
13 They perform services for the Funds, for which they are  
14 paid a fee.

15 Q But are they fiduciaries?

16 A I don't really know the answer to that.

17 MR. FRANKEL: No further questions.

18 THE COURT: Mr. Hunter, would it be correct  
19 to assume that when you attend quarterly board meetings  
20 for each of these Funds that, for the sake of convenience,  
21 the boards with respect to both Balanced Fund and Stock  
22 Fund meet the same day?

23 THE WITNESS: Yes.

24 THE COURT: All right, thank you.

25 Anything further?

MR. SCHWARTZ: No, your Honor.

MR. FRANKEL: May I just ask one question of the witness because of the question your Honor asked.

CROSS-EXAMINATION CONTINUED

BY MR. FRANKEL:

Q Isn't it true that you really have a joint meeting of the two boards, usually?

A Well, no. It is very clearly established which Fund is meeting at which time, and the chairman of the meeting makes it very clear, as I say, that now we are having a meeting of the Balanced Fund board and then we are having a meeting of the Stock Fund board.

Q Don't you have a portion of the combined meeting which is directed to overall matters, such as general investment policy, which would be the same for both boards?

A Yes.

MR. FRANKEL: Thank you. No further questions.

THE COURT: Maybe I should inquire further into this.

Mr. Hunter, what would you consider to be a policy or business justification for having separate contracts between Stein, Roe & Farnham and each of the Funds for the purpose of obtaining their services with

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Hunter

2 respect to those holdings of each of the Funds which  
3 consist of common stock?

4 THE WITNESS: Well, each Fund is a separate  
5 unit.

6 THE COURT: Given that.

7 THE WITNESS: And therefore it seems to me  
8 right that there be a separate contract between each  
9 unit and each Fund and the investment advisor.

10 THE COURT: Why?

11 THE WITNESS: Well, simply because they are  
12 different units. They have different stockholders.  
13 They have different officers and boards of directors.

14 THE COURT: Aren't the stockholders essentially  
15 with the exception of the three unaffiliated directors --  
16 Withdrawn.

17 Aren't the directors essentially the same with  
18 respect to each Fund with the exception of the --  
19 well, even as to the three unaffiliated directors?

20 THE WITNESS: Well, there is a great deal of  
21 duplication, yes, but there are also some individuals  
22 who are on the one and not on the other.

23 THE COURT: Now, of course, there will be many  
24 shareholders who invest in one Fund and not in the other,  
25 no doubt.

1 5 jpmch

Hunter

2 THE WITNESS: Yes.

3 THE COURT: But, as to the administration of  
4 each of the Funds, the policy is determined by the board.

5 THE WITNESS: Yes.

6 THE COURT: You are one of the unaffiliated  
7 three directors who play an important role in the deter-  
8 mination of policy?

9 THE WITNESS: Yes.

10 THE COURT: Some 25 percent of the  
11 investments of Balanced Fund are in debit securities?

12 THE WITNESS: Yes.

13 THE COURT: I gather that the rest is in equity  
14 securities?

15 THE WITNESS: Yes.

16 THE COURT: Now, if the percentage of equity  
17 securities common to each of the Funds is high, as I gather  
18 it is --

19 THE WITNESS: Yes, sir.

20 THE COURT: -- why do you have to get the advice  
21 in two different reports from the same management advisory  
22 firm? Why couldn't you simply say, "Well, as to those  
23 shares, since both Funds are acquiring the same issues,  
24 as to that portion of our investments we think we should  
25 only pay you once, Stein, Roe & Farnham, and then as to

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Hunter

2 those other phases of our operation which are different,  
3 we think we should pay you separately and pursuant to  
4 separate agreement"?

5 THE WITNESS: Well, as I said, I think that it  
6 is significant that each Fund is a separate and distinct  
7 entity. Each of them has a distinct purpose.

8 The Balanced Fund is a more conservative type  
9 of investment than the Stock Fund is. The Balanced Fund  
10 is an appropriate type of investment for certain people  
11 who are interested in, and whose investment needs call  
12 for, a more conservative type of investment which has a  
13 fixed income component.

14 Other people who are differently situated,  
15 whether they have savings bank accounts or pensions or  
16 whatever, and who are therefore more interested in a riskier  
17 type of investment, a more growth-oriented type of thing,  
18 would be more interested in purchasing the Stock Fund.

19 For purposes of administration, it seems to  
20 me that it is desirable that this distinction be maintained  
21 and that each of them be dealt with as a separate unit.

22 THE COURT: Don't you do that, though?

23 THE WITNESS: Yes, we do. I think we should.

24 Now, with respect to the question you asked  
25 about the reporting or the analysis or the investment

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1  
2 decisions on stocks versus bonds, again I think it is  
3 right that each Fund be considered as a total unit and  
4 separately. But it is also important to remember that  
5 essentially Stein, Roe & Farnham are performing a service  
6 for which they are getting paid. They need to be fairly  
7 paid for this service.

8 As Mr. Cooper said, if we were to try to get  
9 somebody else to perform this service, it is quite likely  
10 that whatever formula you applied to do it, you would have  
11 to pay at least as much as Stein Roe was getting for  
12 managing \$300 million of net assets as of the end of 1975.

13 THE COURT: I didn't ask whether somebody else  
14 should do it. I haven't posed that question.

15 My question is, once you have done that which  
16 you are expected to do in your function as a director, an  
17 unaffiliated director, once you have addressed these two  
18 separate entities and what policies should govern the  
19 investments, and so forth, and once you have decided, as  
20 apparently has happened in the last few years, that there  
21 should be a certain percentage of investment in equity  
22 securities, and once it develops that the equity securities  
23 which are acquired are really the same in most instances,  
24 or a majority of instances, in each Fund, having announced  
25 your policy as to how you wish the affairs of the

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conservative Fund to be administered and your policy as to how you wish the more venturesome Fund to be administered, once you have found this commonality, why couldn't you spin off that portion of it which is common and say to Stein, Roe & Farnham, "Why can't we use a common negotiation since we are using the same advisement? And as to those more substantial different areas, we think the contract should be different, and we will pay you in each instance a fair and appropriate fee as negotiated?"

THE WITNESS: That could be done.

THE COURT: It could be done. That takes us halfway along this inquiry.

The next question is, why in your view hasn't it been done or shouldn't it be done?

THE WITNESS: Well, I think I can only say what I said before, your Honor. It seems to me that there is virtue in having each of the Funds, which is a separate unit for purposes of investment for the shareholders, be considered separately from the point of view of management.

THE COURT: You take care of that. You mean the directors take care of insuring the integrity of the separateness of the separateness of the Funds?

THE WITNESS: Yes. But I was thinking also of management by Stein, Roe & Farnham in their function of

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2 ter

3 considering, recommending, making investments.

4 It just seems to me that since the Balanced  
5 Fund serves a purpose and the Stock Fund a different  
6 purpose, from the point of view of the investor, that  
7 there is virtue in their being kept separate from the  
8 point of view of management supervision also.

9 THE COURT: I don't think you were here when  
10 Mr. Woods testified.

11 THE WITNESS: No.

12 THE COURT: He testified more or less to the  
13 effect that, as far as common stocks were concerned, once  
14 they had done their research, using the computers and  
15 field visits and various analyses, when they arrived at  
16 a certain viewpoint that there should be investments  
17 in one type of common stock of a particular issue, if  
18 it was good for one it probably would be good for the  
19 other, and they recommended to the other Fund as well.

20 THE WITNESS: Yes.

21 THE COURT: That's not an irrational position,  
22 is it?

23 THE WITNESS: No. I agree with that position.

24 THE COURT: Now, the question, of course,  
25 and I'm pressing you on it -- I realize that -- is,  
is there any reason why you should pay for that twice,

1 10 jpmch

2 even though you have separate entities?

3 THE WITNESS: Your Honor, I don't really feel  
4 that we are paying for it twice.

5 Essentially, what we are doing, each Fund,  
6 is paying Stein, Roe & Farnham for a total job of investment  
7 advice and execution and management, and the important  
8 thing from the point of view of the stockholders is is the  
9 fee that we are paying for this service a fair fee on  
10 both sides, fair to Stein, Roe & Farnham, and fair and  
11 competitive from the point of view of the shareholders.

12 As I have said, I believe that it is in  
13 terms of the cost comparisons and the management fee  
14 comparisons and the performance comparisons that I see from  
15 time to time.

16 THE COURT: Anything further?

17 MR. SCHWARTZ: No, your Honor.

18 MR. FRANKEL: No, your Honor.

19 THE COURT: Thank you. You may step down.

20 (Witness excused)

21 MR. SCHWARTZ: The defendants whom I represent  
22 rest, your Honor.

23 MR. FRANKEL: If your Honor please, I would  
24 like to make a motion to drop one of the counts in the  
25 amended and supplemented complaint.

1 11 junch

2 The seventh count has to do with an alleged  
3 excess charge for transfer fees and there has been no  
4 evidence adduced on that. I think the simplest way to do  
5 it is to ask that the complaint be amended to eliminate the  
6 seventh count.

7 THE COURT: Any objection?

8 MR. SCHWARTZ: No, your Honor.

9 THE COURT: All right. That will be dropped.

10 MR. SCHWARTZ: Your Honor, there is another  
11 matter which I consider a housekeeping detail.

12 THE COURT: Would you hold on for one moment?  
13 What about Count 3, Mr. Frankel?

14 MR. FRANKEL: If your Honor please, Count 3  
15 I think is one of the most important counts because that  
16 count alleges that the directors failed to minimize the  
17 fees. Your Honor will recall that Mr. Woods said that  
18 until this action was commenced, there has never been any  
19 discussion among the directors about the possibility  
20 of aggregating the assets as to computation of fee.

21 The examination of Mr. Hickey said the same  
22 thing.

23 I think they had a duty to think of this. It  
24 shouldn't have been the plaintiffs' job to suggest  
25 that there should be an aggregation of assets in the  
computation of fees, that the directors themselves should  
have considered this.

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2 THE COURT: One would interpret the testimony  
3 of Messrs Cooper, Hunter and Woods to the effect that  
4 when they made the comparisons that the operation of other  
5 funds in terms of investment performance, expense per-  
6 formance and were aware of what was charged under this,  
7 that and the other circumstance, that implicit in that  
8 consideration was the very thing you are saying they should  
9 have done.

10 The question I am putting to you really is,  
11 whether or not the statute which appears to be applicable  
12 as underlined in Count 3, whether it was effective  
13 for the time period set forth in Count 3.

14 MR. FRANKEL: Before that statute became  
15 effective, there was a case of Moses vs. Burgin.

16 THE COURT: District or First Circuit?

17 MR. FRANKEL: District Court, here. Moses  
18 against Burgin. In that case, the claim was made that  
19 the fee which did not provide for any step down in a large  
20 fund was excessive.

21 Judge Herlands, who heard that case, went  
22 back to the statute then in existence which has been in  
23 existence for more than 20 years, dealing with  
24 embezzlement or stealing from a fund.  
25

1  
2 He said if the management people take more  
3 from the fund than is reasonable, then they are guilty  
4 of violating that statute.

5 On that basis he wrote his decision in the  
6 Court and I believe that was affirmed on appeal.

7 THE COURT: The difficulty that I think I see  
8 at least for the moment is that counsel was asked to submit  
9 plaintiffs' contentions and the statutory basis and the  
10 period of time covered by each count of the amended com-  
11 plaint.

12 In the supplement to the pretrial order you  
13 set forth as to Count 3 that the time covered was until  
14 June 14, 1972, the statute relied upon was the Investment  
15 Company Act, Section 36B.

16 I am then given to understand that that  
17 statute did not cover the time period that you are concerned  
18 with.

19 MR. FRANKEL: Yes.

20 If your Honor please, we also submitted to  
21 your Honor a memorandum of law and the memorandum law --  
22 I am sorry. I now have that memorandum of law. The  
23 case that I cited to your Honor was correct in everything  
24 except the name. The correct name of the case was Brown  
25 against Bu llock, and the citation in the Second Circuit  
is 294 Fed 2d 415.

1 jpb-3

2 In that case the District Judge, 194 Fed.  
3 Supp. 107-107, held that 15 U.S.C. 30a-36, as it had  
4 been in effect since 1940 applied. That is the statute  
5 dealing with embezzlement and so on, and that is the  
6 basis on which we allege the third count.

7 In other words, it is the same statute which  
8 was originally in 1940 and then expanded in 1972.

9 THE COURT: All right. Does that mean then  
10 that you are relying on Section 37 rather than Section 36b?

11 MR. MILLER: If your Honor please, not having  
12 the sections in front of me I hesitate to reply, but I  
13 believe your Honor is correct. But we were relying also  
14 on 15 U.S.C. 30a-36, which has been in effect since 1940,  
15 and was the basis of Judge Berlands' opinion in Brown  
16 against Pollock, which is reported at 194 Fed Supp. 207,  
17 and affirmed at 294 Fed. 2d 415.

18 These citations are in my memorandum of law  
19 that your Honor has.

20 THE COURT: Yes, I see.

21 THE COURT: Mr. Miller, for Balanced Fund.

22 MR. MILLER: Yes, your Honor.

23 THE COURT: Do you have anything that you wish  
24 to present, sir?

25 MR. MILLER: No, your Honor.

jpb-4

THE COURT: Do you rest?

MR. MILLER: Yes, rest, your Honor.

THE COURT: Mr. Petersen?

MR. PETERSEN: Yes, your Honor.

THE COURT: Do you have anything that you wish to present, sir?

MR. PETERSEN: No, your Honor.

THE COURT: So that Stock Fund rests?

MR. PETERSEN: Yes, your Honor.

THE COURT: Mr. Frankel, anything further?

MR. FRANKEL: No, your Honor.

THE COURT: So that plaintiff rests on its entire case?

MR. FRANKEL: Yes, your Honor.

THE COURT: As do defendants. Do you wish to make your motions, gentlemen? Mr. Schwartz?

MR. SCHWARTZ: Yes, your Honor. Before I make them, I would like to point out to the Court that the complaint in this action names a great number of individual defendants all the directors of the funds, for example, and yet only one individual was served, Mr. Thielbar, Stein, Roe & Farnham partnership was served, and two corporations were served, which relate only to the count which Mr.

1 jpb-5

2 Frankel agreed to dismiss.

3 I think it would be appropriate for your  
4 Honor to dismiss with prejudice to the extent that it names  
5 the individuals who were not served when this action  
6 was commenced more than four years ago.

7 THE COURT: You have no objection to that,  
8 Mr. Frankel?

9 MR. FRANKEL: No. We regard the principal  
10 defendant as Stein, Roe & Farnham, which we served.

11 THE COURT: All right, one moment, please.

12 The complaint is dismissed with prejudice  
13 as to all defendants not served.

14 MR. FRANKEL: If your Honor please, I have no  
15 objection to the dismissal. But I think it should be with-  
16 out prejudice.

17 THE COURT: All right. I think Mr. Frankel  
18 is probably right. The issue is not before us. We  
19 haven't tried it as to them. So I will modify that dismissed.

20 MR. SCHWARTZ: There is precedent in this  
21 District for dismissing with prejudice when as much as a  
22 year has elapsed between service and the trial.

23 But I won't press it.

24 THE COURT: I will take it like Balanced Fund  
25 as conservative.

1 jpb-6

2 All those not served dismissed.

3 Let's see who remains. Stein, Roe remains.

4 The partnership.

5 Who else, Mr. Schwartz?

6 MR. SCHWARTZ: Mr. Thielbar.

7 THE COURT: One moment.

8 MR. SCHWARTZ: And that is it, and the funds.

9 THE COURT: Who?

10 MR. SCHWARTZ: Mr. Thielbar and the funds.

11 THE COURT: And the two funds. All right,  
12 you are now about to be heard as to Stein, Roe and as to  
13 Mr. Thielbar.

14 MR. SCHWARTZ: Yes, your Honor.

15 THE COURT: All right.

16 MR. SCHWARTZ: I move on behalf of those defend-  
17 ants to dismiss the complaint on the ground that by no  
18 stretch of the imagination can I see how Mr. Frankel has  
19 proved the claim or cause of action on behalf of these  
20 two funds.

21 Now, I recognize that there are many, many  
22 exhibits which we have imposed upon your Honor, both  
23 Mr. Frankel and I. I assume that you have not had the  
24 opportunity to read them. I think what they all add up  
25

1 jpb-7

2 to, your Honor, unless Mr. Frankel is able to point to  
3 some fact in the exhibits which has escaped me, but  
4 they all add up to, regardless of the legal theory,  
5 whether it is a claim which I would consider a far-fetched  
6 one on this record of any proof of embezzlement or  
7 larceny, whether it be a claim under 36(b) of the  
8 40 Act, which was not in effect at the time this action  
9 was commenced. Whether it be under 36(a) with its  
10 strict test of breach of fiduciary duty involving personal  
11 misconduct, whether it be on the theory of the pendant  
12 jurisdiction, so we have the law of New York or  
13 whether it be some statutory basis which I can't quite see  
14 a breach of fiduciary duty.

15 No matter what it is, I don't see any evidence  
16 at all of breach of fiduciary duty, of the payment of  
17 compensation which was so grossly excessive in relation  
18 to the services rendered that the Court would be obliged  
19 to consider it. I see no basis upon which Mr. Frankel  
20 can claim that he has proved a claim.

21 Now, on this question of aggregation, with  
22 all respect to Mr. Frankel, I think it is a case of tweedle-  
23 dum and tweedledee.

24 The question is not whether a formula is fair,  
25 because the formula can't be either fair or unfair in the

1 jpb-8

2 abstract. A formula can only be considered in terms of  
3 the dollars it yields and the question for the Court to  
4 determine is whether the dollars paid by these funds  
5 to their management at the most stringent test were fair  
6 or reasonable.

7 I would say the test is much more strict than  
8 that. The test is whether they were so unreasonable,  
9 so grossly disproportionate to the nature and quality  
10 of the services rendered that the Court would find ways  
11 or a breach of fiduciary duty on the part of those who  
12 paid and those who received.

13 That is the question.

14 What Mr. Frankel seems to forget is that let's  
15 assume for a moment that the funds were aggregated for the  
16 purpose of computing the fee. He would then have to  
17 prove, which he hasn't, that the formula would remain fixed  
18 and concrete.

19 Obviously as three witnesses have testified,  
20 that is not the case. If there were a single contract,  
21 or if the two contracts separately provided for aggregation,  
22 there is not a scintilla of evidence and as a matter of  
23 common sense, there couldn't be that the formula would  
24 remain the same, because the parties would then have to  
25

1 jpb-9

2 negotiate a new formula to come up with one which reached  
3 a fee which was mutually satisfactory to the parties.

4 Now, Mr. Frankel hasn't proved that there  
5 would be a penny in savings if these funds were merged.  
6 The only reason on the subject is that there would be  
7 none. He hasn't proved any overriding business purpose  
8 in putting them together and he hasn't proved that it  
9 would be a saving of a dollar in the fee paid, because  
10 if the aggregate, then the formula is open for negotiations.

11 I know of nothing in the documents, your Honor,  
12 which would support that claim. If Mr. Frankel can  
13 point to something, then there is something to talk about  
14 in brief.

15 As I stand here today, I will be happy to  
16 brief this to your Honor and submit proposed findings of  
17 fact. I believe no matter what the legal standard  
18 is, what section of the Act, or the common law, he hasn't  
19 proved his claim.

20 THE COURT: Mr. Petersen, next?

21 MR. PETERSEN: Yes, your Honor.

22 THE COURT: Do you wish to be heard, sir?

23 MR. PETERSEN: No, nothing further.

24 THE COURT: Mr. Miller.

25 MR. MILLER: Nothing further, your Honor.

1 jpb-10

2 THE COURT: You join in the motion?

3 MR. MILLER: Yes.

4 THE COURT: Mr. Frankel.

5 MR. FRANKEL: If your Honor please, there are  
6 two principal bases of liability here which have come up  
7 very clearly in the trial of this action. The first one  
8 stems from Brown against Bullock.

9 Brown against Bullock, Judge Herlands held,  
10 194 Fed. sub 207, that it was a violation of the statute  
11 as it then existed and that was back before. It had been  
12 a violation since 1940 for a large fund not to have a step  
13 down. That was appealed and it was affirmed on appeal  
14 in 1961.

15 Thereafter practically every fund of any size  
16 put in some kind of a step down.

17 Now, if a fund is required to have a step down,  
18 the way is open to claim, as we have claimed here, that  
19 the step down should deal with a fund, the fund or funds  
20 as they actually exist.

21 In the computation of the step down, the fund  
22 when the two are virtually identical in the stock invest-  
23 ment should be aggregated.

24 That is the claim that flows from Brown against  
25

1 jpb-11

2 Bullock.

3 Now, the other basis of liability here is Moses  
4 against Burdin, which was in the First Circuit of 1971,  
5 445 Fed 2d 369.

6 In that case, the Court held that there was  
7 liability on the part of the directors of a fund and  
8 presumably all of the directors for failure to consider  
9 available methods of reducing the investment advisory fee  
10 and on behalf of the investment advisor for failure to call  
11 such possibilities to the attention of the directors.

12 Now, the testimony is uncontradicted of Mr.  
13 Hickey and Mr. Woods, that until the action was started,  
14 nobody called to their attention the possibility of  
15 reducing the investment advisory fees by combining the  
16 two funds in some manner, either by aggregating the assets  
17 for computation of fees or by merger or otherwise.

18 There has not been any evidence to contradict  
19 the evidence in the Hickey deposition and the evidence  
20 of Mr. Woods that this was never considered.

21 That is an additional basis of liability  
22 which is now embodied in the statute in 15 U.S.C.  
23 88-15(c).

24 On either basis of liability, there is suf-  
25

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ficient evidence to support a verdict in favor of the  
plaintiff on all of the six causes of action now contained  
in the complaint.

(continued on next page.)

End 4B

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MR. SCHWARTZ: May I say just a few words,

3

your Honor.

4

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6

7

I don't want to pretend that I have in my head every case involving the mutual fund business, so I am able to contradict by memory what Mr. Frankel has said.

8

9

10

11

12

It so happened that I represented certain of the defendants in Brown v. Bullock, and I can represent to your Honor, without rereading it, that neither Judge Herlands nor its affirmance by the Second Circuit has the slightest thing to do with this case.

13

14

15

In that case I was so foolish on behalf of my clients as to move to dismiss the complaint under Rule 12.

16

17

18

19

20

Mr. Pomerantz alleged in the complaint that the defendant directors, considering the management fee, had looted the fund and wilfully embezzled the assets. The question was whether that stated a cause of action and Judge Herlands said it did.

21

22

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25

Judge Friendly, in affirming it for the Second Circuit said the question of management fee under the Act as it then stood, particularly in light of these alleged raised questions under Section 15 which imposes a duty of inquiry on the part of the directors. The funds

1 pgb-2

2 in that case was a fund known as Dividend shares. Its  
3 fee was a step down fee and always had been. There is  
4 not one word in that opinion which suggests that management  
5 has a statutory duty to step down.

6 The fact is that that fund always had it and  
7 had it since the day it was organized.

8 With respect to Moses vs. Bergin, I was not  
9 representing a party in that litigation, but I just tried  
10 a case in this court last December, before Judge Carter,  
11 that involved that issue, and I should point out to your  
12 Honor that the precise question was considered by the  
13 Second Circuit about three months ago in a case which,  
14 so far as I know, is not yet an officially reported case.  
15 Fogel vs. Chestnutt, and I will represent to your Honor  
16 that Fogel and Chestnutt has less to do with this case  
17 than Moses against Bergin.

18 Moses against Bergin did not involve management  
19 fees in any way. It involved the question of the utiliza-  
20 tion of fund portfolio brokerage commissions.

21 (continued on next page.)

22 End 5A

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M 5b

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1 All that case held, Moses v. Bergin in the  
2 First Circuit -- and this is Judge Friendly's interpretation  
3 and not mine -- was that the management directors of  
4 a mutual fund are liable to the fund if they wilfully and  
5 deliberately fail to disclose to the outside directors  
6 of the fund a course of conduct which could yield the fund  
7 more money or save the fund money, particularly when it  
8 involved a conflict of interest on the part of the management  
9 directors.  
10

11 In fact, in that case, the First Circuit  
12 dismissed the case against the outside directors and held  
13 only the management directors liable because of their  
14 failure to make disclosure to the outside directors.  
15 It has nothing to do with this case.

16 I reiterate what I said before: I have heard  
17 Mr. Frankel point to no fact in the documents or elsewhere  
18 which, in my judgment, could suport a claim against any  
19 of these defendants.

20 MR. FRANKEL: May I be heard one moment?

21 THE COURT: Yes.

22 MR. FRANKEL: My friend, Mr. Schwartz, is  
23 right about some of the things he said. But I can't agree  
24 with him that Brown v. Bullock and Moses v. Burgin have  
25 nothing to do with this case. Both of them are attacks on

1 2 pgmch

2 the compensation of investment advisors. This case is  
3 an attack on the compensation of the investment advisor.

4 When Brown v. Bullock held that, as  
5 Judge Herlands said, to take excessive compensation is  
6 the equivalent of embezzlement, that provided the judicial  
7 basis for this case as it did in Brown v. Bullock. The  
8 fact that that happened on a motion instead of after trial  
9 makes no difference.

10 In Moses v. Bergin, where the Court held  
11 that the investment advisor had an obligation to point  
12 out to the directors steps that could be taken to minimize  
13 the fee -- that's the same obligation as there is in this  
14 case.

15 THE COURT: Thank you gentlemen.

16 Decision reserved.

17 You are invited to submit supplemental post-  
18 trial findings and memoranda.

19 How long do you think you will need if you  
20 wish to submit it?

21 MR. FRANKEL: I would like a minimum of two  
22 weeks, your Honor.

23 THE COURT: Is that satisfactory?

24 MR. SCHWARTZ: Yes. Would you like them  
25 simultaneously?

THE COURT: I think that would be satisfactory.

- - -

*Stein  
Roe &  
Farnham*

**Balanced Fund, Inc.**

**Stock Fund, Inc.**

**Capital Opportunities Fund, Inc.**

*Stein  
Roe &  
Farnham*

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*The purpose of this information booklet is to provide those seeking professional supervision of their investments with background information about Stein Roe & Farnham Balanced Fund, Inc., Stein Roe & Farnham Stock Fund, Inc., and Stein Roe & Farnham Capital Opportunities Fund, Inc. The booklet explains the investment policies and objectives of the three Funds, outlines a variety of special services made available to the individual investor, and provides the prospective shareholder with other relevant information.*

*The Funds employ no salesmen and no sales charges are paid by the purchasers of their shares. Thus the investor must determine for himself whether the Funds are appropriate for the implementation of his investment objectives. We therefore hope this booklet, in conjunction with the Funds' prospectuses, will be particularly helpful in enabling a prospective shareholder to make a well-considered decision.*

*Stein  
Roe &  
Farnham*

*Investment Counsel*

## THE PROBLEM OF INVESTING

In the past, it was widely believed that a satisfactory investment program could consist solely of savings deposits and government and corporate bonds—investments assuring a specified return under all economic conditions. Today, thoughtful investors seriously question this belief. Observation clearly shows that a person living on a fixed-dollar income has experienced serious deterioration in his standard of living as the cost of goods and services has continued to rise. On the other hand, those who have had a substantial percentage of their savings invested in well-selected common stocks have over time realized both enhancement of principal and increased income permitting them to offset the increased cost of living. Therefore, most investors now recognize that an investment program should be carefully balanced between those investments assuring a specified return and providing a ready cash reserve, and other investments of an equity nature providing the possibility of both increased principal and income.

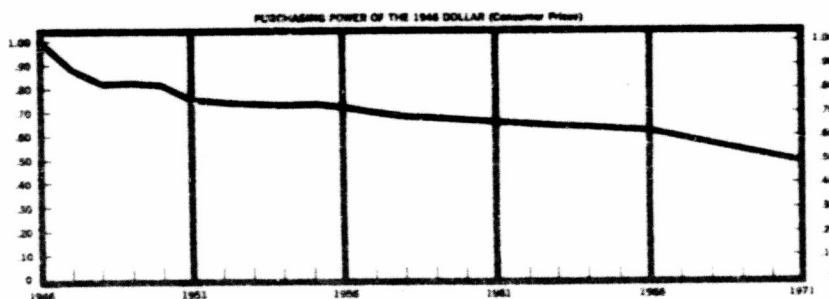
### Owning Common Stocks

Two major factors support the conclusion that the equity portion of an overall investment program should, in most instances, consist of common stocks. The first is the historic growth of the American economy and the concurrent fact that the better American business enterprises have both influenced and shared in that growth through increased size, earnings, dividends, and common stock prices. The second factor is that well-selected common stocks have in the past provided protection against erosions in purchasing power both through enhancement of principal and through increases in dividends.

The thoughtful investor is acutely aware that the future will in all likelihood not mirror the past; that basic assumptions and conclusions are subject to revision and change. There have been periods when dividends and common stock prices declined even though the cost of living increased significantly. Common stock prices have always been vulnerable to sharp fluctuations and unfavorable conditions may result in reduced dividends. These potential adversities must be given appropriate weight in the investor's financial planning.

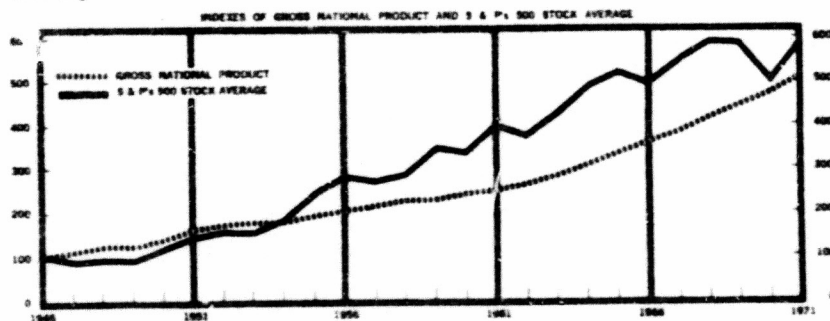
### The Cost of Living

Both recent and past experience clearly indicate a significant increase in the cost of goods and services and resultant decrease in the purchasing power of the dollar. Consequently, many persons, particularly those living on fixed incomes, have been unable to maintain the standard of living they might otherwise have expected. The chart below illustrates that a 1946 dollar will today purchase only 48¢ in goods and services.



### Gross National Product and Common Stock Prices

The past quarter-century has been characterized by an equally significant increase in the Gross National Product, that is, the total of goods and services produced, and in the prices of common stocks. Illustrated below is a measure of the relative increases in Gross National Product and in the level of common stock prices as measured by the Standard & Poor's 500 Stock Average. Both are now more than five times their level in 1946, but, of course, this chart is an indication of the past and not a prediction for the future.



### Selecting Investments

Countless investment opportunities are available. Clearly, some companies have continued to do well, while others have fallen by the wayside for competitive, technological, or other reasons. The continuous study and appraisal of industries and the securities of many companies provided by professional management, along with the broader diversification made possible by combining many individual investors' assets, are two important advantages of mutual funds.

### The Stein Roe & Farnham Funds

The investment counsel firm of Stein Roe & Farnham organized the Balanced Fund, the Stock Fund, and the Capital Opportunities Fund to enable investors to invest in the securities markets and to obtain the investment management of the firm through a pooling of their assets. In common with other mutual funds, the Stein Roe & Farnham Funds permit the investor: to diversify risk by purchasing shares of a mutual fund, which in turn invests its assets in a portfolio containing many securities; to employ competent, experienced investment managers at a reasonable cost for supervision of his investments, rather than attempting the task by himself; and to achieve thoughtful selection of and continuous attention to his investments. Since the interest of shareholders in the Funds is based on the number of shares they hold, they participate pro rata according to their shareholdings in the net income and profits or losses from the securities the Funds hold. Costs of operation are divided among all shareholders and are deducted from the income from the securities held.

### No Sales Charges

The Stein Roe & Farnham Funds are distinct from most other mutual funds in that shares of the Funds are purchased at net asset value. The Funds employ no salesmen and there are neither sales nor distribution charges ordinarily associated with the purchase of mutual fund shares. These sales charges generally amount to 7% to 9% of the purchase price on purchases up to about \$10,000, and, therefore, the value of such a fund's portfolio must rise a percentage equal to the "loading" charge before a shareholder's investment is equal to what he paid. An investment in the Stein Roe & Farnham Funds, however, is not subject to any sales commission or other distribution charge. Consequently, any appreciation in the value of the Funds' portfolios is immediately reflected in appreciation in the value of the investor's shares over his cost.

### Selecting a Fund

An investor may structure his investment program to best suit his individual requirements by investing in the Balanced Fund, the Stock Fund, or the Capital Opportunities Fund, or in a combination of them. The Funds' management believes that the Balanced Fund is the preferable investment in most situations. However, there are circumstances which make the Stock Fund or the Capital Opportunities Fund more appropriate. For example, the Stock Fund might be appropriate where the investor has no need for the fixed-income element of the Balanced Fund because he has sufficient fixed-dollar investments such as life insurance, social security benefits, savings bonds, or private pension plans. The Capital Opportunities Fund may be appropriate where the investor desires to add an element of somewhat greater risk to his portfolio in the hope of greater capital appreciation. One should, therefore, carefully consider which Fund or what combination of the Funds will most nearly accomplish his investment objectives.

A wide variety of individuals and organizations own shares of the Funds:

Type	Approximate Number of Shareholders		
	Balanced Fund	Stock Fund	Capital Opportunities Fund
Individuals .....	7,300	10,000	1,500
Custodians for Minors .....	1,100	3,000	300
Trusts .....	700	800	100
Pension and Profit-Sharing Plans...	300	400	50
Religious, Charitable, and Educational Institutions .....	100	50	
Corporations, Partnerships, and Associations .....	100	100	50
Nominees, Brokers, and Other .....	200	100	100



#### Professional Investment Counsel

## THE INVESTMENT ADVISER

Stein Roe & Farnham was founded in 1932 to provide clients with independent professional investment counsel. It believes it can best serve its clients when the client's and the firm's interests are identical and has, therefore, never acted as a broker or dealer in securities. Today, the firm is one of the largest investment counsel organizations in the United States and supervises the investment portfolios of virtually every type of investor, including individuals, trusts, pension and profit-sharing plans, corporations, and charitable and educational institutions. During its 40 years, Stein Roe & Farnham has developed a staff of highly trained research analysts and investment counsel executives who appraise investment opportunities and advise clients on their investment programs. This experienced staff provides the management and investment advice for Stein Roe & Farnham Balanced Fund, Inc., Stein Roe & Farnham Stock Fund, Inc., and Stein Roe & Farnham Capital Opportunities Fund, Inc.

#### Investment Philosophy

Stein Roe & Farnham believes the needs of most investors are best served through a balancing of fixed-income and common stock investments. The ratio between these two categories is varied as changes occur in the general economic outlook and the levels of securities prices, but, at almost all times, the firm believes the emphasis should be toward stocks.

Fixed-income policy emphasizes the selection of issues which are almost entirely free of credit risk, fluctuate little in value except with changes in money rates, and are not affected to any important extent by business conditions.

Common stock policy, on the other hand, primarily emphasizes capital appreciation, with persistent effort being directed toward the selection of good quality companies having long-term growth potential.



## A BALANCED PORTFOLIO

*Stein Roe & Farnham* **BALANCED FUND, Inc.**

### History

The Balanced Fund was organized in 1949 in response to investors who wished to obtain the investment management of Stein Roe & Farnham and whose capital could best be supervised by combining it with that of others having similar investment objectives. Total net assets of the Fund have grown without the use of salesmen from an initial \$105,000 to about \$175 million. The Fund now has approximately 10,000 shareholders.

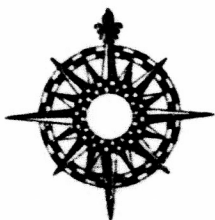
### Objective

The Balanced Fund is designed to provide its shareholders with a complete investment program. The Fund attempts to maintain and, when possible, to increase the purchasing power of the capital invested while providing income.

### Investment Policy

The Balanced Fund normally invests from 60% to 75% of its assets in common stocks carefully selected for long-term growth potential. The remaining portion of its assets is invested in fixed-income securities such as government and corporate bonds and preferred stocks. The percentage of the Fund's assets invested in common stocks varies in accordance with Stein Roe & Farnham's assessment of the economic outlook and the levels of the securities markets.

The value of the Fund's shares will reflect changes in the general level of the stock markets. However, because fixed-income securities are usually not as subject to significant price changes as common stocks, the assets of the Balanced Fund ordinarily fluctuate less than those of a fund whose assets are invested entirely in common stocks.



## A COMMON STOCK PORTFOLIO

*Stein Roe & Farnham STOCK FUND, Inc.*

### History

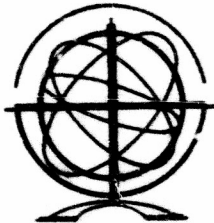
The Stock Fund was organized to meet the needs of investors whose fixed-dollar requirements are primarily met through other means—life insurance, social security benefits, savings bonds, and private pension plans. The original capital of \$120,000 was subscribed for by partners and employees of Stein Roe & Farnham, and shares were first offered to the public on July 1, 1958. Presently, the Fund has total net assets of about \$150 million, owned by approximately 14,000 shareholders.

### Objective

The Stock Fund is designed to provide its shareholders with a common stock investment program giving special emphasis to selection of common stocks which, in the opinion of Stein Roe & Farnham, have long-term growth potential. For the most part, these same securities are also represented in the common stock portion of the Balanced Fund.

### Investment Policy

Ordinarily, substantially all of the Stock Fund's assets are invested in a widely diversified portfolio of common stock and other equity type securities. However, it may reduce its holdings of such securities and maintain temporary reserves of fixed-income securities and cash for defensive purposes when such action is deemed advisable. The net asset value of the Fund's shares fluctuates with the market value of the Fund's investments. The Stock Fund reflects changes in stock market levels more noticeably than the Balanced Fund which invests a significant percentage of its assets in fixed-income securities.



## A MORE AGGRESSIVE PORTFOLIO

*Stein Roe & Farnham* CAPITAL OPPORTUNITIES FUND, Inc.

### History

The Capital Opportunities Fund is intended for those investors who wish to include in their portfolio a security in which they accept a greater element of risk in the hope of greater long-term capital appreciation. Until March, 1969 the Fund was named Stein Roe & Farnham International Fund, Inc. and invested almost entirely in foreign securities. Presently, the Fund has total net assets of about \$20 million, owned by approximately 2,000 shareholders.

### Objective

The Capital Opportunities Fund seeks long-term capital appreciation without attempting to limit risk through wide diversification. The Fund is not designed to represent the entire stock portion of an investment program and an investment in its shares may be subject to greater than average risk.

### Investment Policy

The Capital Opportunities Fund may invest in all types of equity and debt securities of (a) enterprises with interests entirely or primarily in the United States, (b) domestic enterprises with important interests outside the United States, and (c) foreign enterprises. The Capital Opportunities Fund may be subject to more substantial changes in its net asset value than either the Stock or Balanced Funds.

## INFORMATION ABOUT THE FUNDS

Current and background information regarding the Funds is available from many sources. Shareholders receive annual and quarterly reports listing the securities owned by the Funds.

The per share net asset value of each Fund is published daily in all editions of *The Wall Street Journal*, in most other leading newspapers, and in several financial publications. Records of the Funds are also included in mutual fund performance studies, obtainable from local libraries.

Correspondence regarding the operations or policies of the Funds is welcomed and receives the personal attention of their officers.

### **Purchasing and Redeeming Shares**

Shares are bought directly from the Funds in Chicago, either by mail or in person. The initial purchase must amount to at least \$300, and each subsequent purchase must amount to at least \$50. Subscription applications are enclosed in the prospectus of each Fund or will be mailed upon request. An order received and accepted before the close of trading on the New York Stock Exchange on any business day will be confirmed to the purchaser at that day's closing net asset value. Orders received and accepted after the close of trading on the New York Stock Exchange are entered at the next business day's closing net asset value.

The investor may also redeem any or all shares of the Funds at net asset value. There are no redemption fees or charges of any kind. The time requirements applying to subscriptions also apply to redemptions. The redemption price may be more or less than the purchase price, depending on the market value of the portfolio securities.

The Funds' shareholder accounting system has been designed to accommodate the special requirements of a variety of investors, and shareholders may change from one type of shareholder account to another in accordance with their individual needs. There are no charges to the shareholder in connection with any of the following services or for changing from one type of account to another.

**Regular Account**

Shareholders desiring to reinvest income dividends and capital gains distributions may select a Regular Account in which (1) the entire dollar amount of each purchase is invested in full and fractional Fund shares which will be credited to the shareholder's account by the Fund's transfer agent; (2) investment income dividends and capital gains distributions are automatically reinvested in additional full and fractional Fund shares at the per share net asset value on the ex-dividend date; (3) each transaction is confirmed to the shareholder immediately, and a year-to-date statement of the transactions in his account will be sent to him quarterly; and (4) at the end of the calendar year an annual statement is sent to the shareholder detailing all transactions in his account during the year.

**Monthly Purchase Plan**

Those interested in purchasing shares of the Fund on a monthly basis should select the Monthly Purchase Plan. Each time additional shares are purchased for the account, the shareholder will receive, together with a confirmation of the purchase, a notice of next investment and a return envelope to be used for the next purchase. In all other respects, the Monthly Purchase Plan is identical to the Regular Account.

**Cash Dividend Account**

Those wishing to receive investment income dividends in cash should select a Cash Dividend Account. Such shareholders are also given the option to receive any capital gains distributions either in cash or in additional shares of the Fund. However, upon written instructions, the Fund will establish an account so that capital gains distributions are always paid in cash.

**Withdrawal Plan**

Shareholders of the Stock or Balanced Fund owning shares with a current net asset value of at least \$10,000 and wishing to receive a check on a regular monthly or quarterly basis through systematic redemption of shares owned, may do so by participating in the Withdrawal Plan. The purpose of these Plans is to enable the investor who is past his highest income producing years to augment other income through a planned reduction of prior years' accumulations. Withdrawal Plan application forms are available from these Funds.

**Keogh Act Program**

For self-employed individuals desiring to avail themselves of the provisions of the Self-Employed Individuals Tax Retirement Act (Keogh Act), the Balanced and Stock Funds have available a Tax-Qualified Retirement Investment Program utilizing a standard form of Profit-Sharing and Retirement Plan and related Custodial Agreement under which all contributions may be invested in the Fund selected. The Standard Profit-Sharing and Retirement Plan was approved by the Internal Revenue Service as Qualified Master Plan # 715158A-1 (formerly # CHI:POL:64-5). A descriptive brochure and application form are available on request.

**Ownership by Minors**

Although minors cannot directly purchase shares of the Funds, they can own shares through a custodial arrangement or be given a beneficial interest in them. Under the Uniform Gifts to Minors Acts, now in effect in all 50 states, minors may own and share that are held by an adult custodian until they reach age 21. Also, minors may buy shares for the benefit of minors.

**Dividend Policies**

All interest and dividends received by the Funds from their investments are distributed to shareholders after deduction of operating expenses. Distributions are paid at approximately the end of January, April, July, and October by the Balanced and Stock Funds. The Capital Opportunities Fund pays an annual dividend from net investment income in February. In addition, any net profits realized from the sales of a Fund's investments in a given year are distributed to shareholders as a capital gains distribution in January or February of the following year. Shareholders having Cash Dividend Accounts are given the option of receiving a capital gains distribution either in cash or additional shares of the Fund.

**Taxation of Dividends**

Dividends from net investment income and any net short-term capital gains are taxable to the shareholders as income. Capital gains distributions are taxable to the shareholders as long-term capital gains regardless of how long the Fund shares have been owned. Shareholders receive each January a Substitute Form 1099M detailing the exact amount of income dividends and any capital gains distribution paid them during the previous year and the tax status of these distributions.

### Management Costs and Expenses

For its services as investment adviser and manager of the Funds, Stein Roe & Farnham receives a management fee. For the Balanced and Stock Funds, the fee, expressed on an annual basis, is  $\frac{1}{2}$  of 1% of the first \$100 million of average net assets. The fee is reduced to  $\frac{2}{5}$  of 1% of average net assets exceeding \$100 million. The annual fee for the Capital Opportunities Fund is  $\frac{1}{2}$  of 1% of average net assets. Management charges are common to all mutual funds and are distinct from sales charges.

The current annual operating expenses of the Balanced and Stock Funds are less than  $\frac{6}{10}$  of 1% of their average net asset values while those of the Capital Opportunities Fund are approximately  $\frac{7}{10}$  of 1%. This includes the management fee paid to the investment adviser. Stein Roe & Farnham also provides office space without charge and assumes substantially all expenses for bookkeeping. The Funds' officers and staff are all partners or employees of Stein Roe & Farnham and receive no compensation from the Funds.

### Shares Owned by Stein Roe & Farnham Personnel

The officers and directors of the Funds, the partners of Stein Roe & Farnham and their immediate families, and the employees of the firm own shares of the Balanced Fund having a current asset value in excess of \$1,200,000 and shares of the Stock and Capital Opportunities Funds having an approximate value of \$1,400,000 and \$475,000, respectively. The Stein Roe & Farnham Profit-Sharing Trust, in which the partners and employees of Stein Roe & Farnham participate, now owns shares of the Balanced Fund and Stock Fund with a value of \$1,800,000.

### Custodians, Auditors, and Transfer Agent

The First National Bank of Chicago is custodian of the cash and securities owned by the Balanced Fund and the Harris Trust and Savings Bank is custodian of the cash and securities of the Stock Fund and the Capital Opportunities Fund. The custodians have no responsibility for investment management. Independent certified public accounting firms make a complete annual audit of the Funds. Lybrand, Ross Bros. & Montgomery is auditor of the Balanced Fund and Arthur Andersen & Co. is auditor of the Stock and Capital Opportunities Funds. The Wacker-Adams Data Service Corp. is each Fund's agent for the transfer of shares, disbursement of dividends, and maintenance of shareholder accounting records. Wacker-Adams Data Service Corp. is owned and was organized by individuals who are partners of Stein Roe & Farnham to assure that adequate transfer agency service would be available to the Funds at a reasonable cost.

**Stein  
Roe &  
Farnham**  
*Investment Counsel*

*This information booklet is designed to provide a brief description of the Stein Roe & Farnham Balanced, Stock, and Capital Opportunities Funds. Current prospectuses, which must precede or accompany this booklet, contain more detailed information. Shares of the Funds are purchased and redeemed at net asset value with no sales or redemption charges.*

Additional information about the Funds, including current prospectuses, may be obtained from the office of the Funds, 150 South Wacker Drive, Chicago, Illinois 60606. Inquiries are welcomed and promptly answered by the officers of the Funds. Telephone area code (312)

Stein Roe & Farnham Balanced Fund, Inc.	368-7810
Stein Roe & Farnham Stock Fund, Inc.	368-7800
Stein Roe & Farnham Capital Opportunities Fund, Inc.	368-7820

January, 1972

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

CHARLES P. WOLFSON, et al., :

Plaintiffs, :

- v - :

72 Civ. 2230

R. DOUGLASS COOPER, et al., :

Defendants. :

-----x

APPEARANCES:

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LAWRENCE W. PIERCE, D. J.

MEMORANDUM OPINION

Plaintiffs, derivative shareholders of defendants Stein Roe & Farnham Stock Fund, Inc. ("Stock Fund") and Stein Roe & Farnham Balanced Fund, Inc. ("Balanced Fund"), bring this lawsuit against the two mutual funds, their joint investment adviser, defendant Stein Roe & Farnham ("the Adviser"), and numerous individual defendants affiliated with the Funds and the Adviser. The essence of plaintiffs' claim is that the structure of the two Funds and their relationship to the Adviser has resulted in excessive management fees in violation of the Investment Company Act of 1940, 15 U.S.C. §80a-1 et seq. and the Investment Advisers Act of 1940, 15 U.S.C. §80b-1 et seq.

In Count One plaintiffs charge that the separate existence of the similar mutual funds has resulted in excessive fees paid to the Adviser, in violation of 15 U.S.C. §80a-35 and §80a-36. Count Two alleges that the Adviser and

the individual defendants have violated 15 U.S.C. §80a-35(b). The third count charges that the directors of the Funds and the Adviser have violated their respective fiduciary duties in violation of §80a-36. Count Four alleges that the Adviser violated 15 U.S.C. §80b-6 by failing to advise the Funds to merge or aggregate their assets for purposes of fee calculation. Count Five alleges that the Adviser's contract with the Funds violated 15 U.S.C. §80a-15(a) by failing to describe accurately the fee compensation which plaintiffs claim is duplicative. In Count Six, plaintiffs assert that the proxy statements of both Funds have been in violation of 15 U.S.C. §80b-6 and §80b-7 for their failure to disclose the alleged "double billing" to the shareholders. Count Seven was abandoned and dismissed on consent at trial. At trial the Court also dismissed the complaint as against all defendants other than the Funds, the Adviser, and defendant Theilbar, for failure of the plaintiffs to effect service. Having examined the evidence and considered the applicable law, the Court now concludes that plaintiffs' case is without merit and dismisses the complaint in its entirety. The following shall constitute findings of fact and conclusions of law pursuant to Rule 52(a) Fed.R.Civ.P.

Findings of Fact

1. Nathaniel C. Wolfson, and his executors following his death, held shares of Stock Fund continuously during the period complained of herein. Plaintiff Herbert A. Fuentes held shares of Balanced Fund during the same period.

2. Balanced Fund is a corporation organized on August 25, 1949 and currently existing under the laws of the State of Maryland. Stock Fund is a corporation organized on April 15, 1958 and currently existing under the laws of the State of Maryland. Both concerns are diversified open-end management investment companies, as those terms are defined in the Investment Company Act of 1940. Both Funds are registered as such with the Securities and Exchange Commission.

3. Balanced Fund was organized with the stated investment objective of providing a diversified portfolio of securities, of which approximately 25% normally have been long-term debt securities. Stock Fund, on the other hand, was organized with the investment objective of providing a diversified portfolio consisting almost entire of common stocks and other equity securities.

4. Each Fund is a "no-load" fund, a mutual fund in which a purchasing shareholder pays no sales charge of "load" in connection with his investment.

5. Defendant Stein Roe & Farnham ("the Adviser") is an Illinois limited partnership engaged exclusively in investment counseling. The Adviser is the manager, investment adviser and distributor of shares for both Funds. Further, the Adviser makes investment recommendations to each Fund's board of directors, and furnishes office space and clerical and bookkeeping services to the Funds. The Funds share common office space in Chicago, Illinois.

6. The Adviser performs advisory services for many other individual and institutional clients. The combined assets of Balance Fund and Stock Fund, some 300 million dollars, constitute approximately 7.5% of the four billion dollars in portfolios managed by the Adviser.

7. There is significant overlap between those who are partners of the Adviser and those who sit on the board of the two Funds. For example, as of December 31, 1971, defendants Cooper, Farnham, Hagey, Hickey, Hunter, Jeuck, Stein, Tittle and Woods were directors of both Funds. All the individual defendants, with the exception of defendants Bates, Cooper, Hunter and Jeuck, are partners with the

Adviser. The parties have stipulated that defendants Bates, Cooper, Hunter and Jeuck are neither "affiliated" nor "interested persons" within the meaning of the Investment Company Act.

8. For its services to the two Funds, the Adviser receives on a quarterly basis a management fee, set by each Fund's investment advisory contract, of one-eighth of one per cent of each fund's net asset value up to \$100,000,000 as determined by valuations made at the close of each month in the quarterly period. The contracts contain a fee reduction, or "step down", to only one-tenth of one percent of the net asset value of each Fund which exceeds \$100,000,000. The fees paid over the period of this lawsuit have been in accordance with the investment advisory contracts.

9. The evidence presented by defendants demonstrates that Balanced Fund was organized to provide its shareholders with a stable and balanced investment portfolio which would remain essentially secure against periods of recession and inflation. The 25% of Balanced Fund invested in debt securities is concentrated on high-quality non-speculative issues which fluctuate little in value aside from the effect of changes in interest rates.

10. Stock Fund, on the other hand, was organized for investors who already enjoy adequate fixed-income security,

such as from life insurance programs, annuities, pensions or the like, and who are therefore already essentially protected against adverse market developments. Accordingly, Stock Fund is comprised almost totally of common stocks which, in the Adviser's opinion, have possibilities for long-term appreciation.

11. The evidence presented by defendants, and uncontested by plaintiffs, demonstrates that the investment performance of each Fund has always been decidedly above average when compared to that prevalent in the industry.

12. Despite the different investment objectives of the Funds, the undisputed evidence shows that the issues held by Stock Fund and the equity securities portion of Balanced Fund are so similar as to be for all practical purposes identical. Further, each Fund usually effects trading in the same issues at the same time, acting upon the same advice given by the Adviser. Each Fund usually acquires and divests itself of similar issues at the same time. The buy and sell orders of each Fund are placed simultaneously as often as possible. As of December 31, 1971, some forty-eight issues were held by both Funds, constituting 86% of Stock Fund and 71% of Balanced Fund. Of these forty-eight issues, twenty issues were at that

time held in identical amounts by each Fund.

13. This essentially identical nature of Stock Fund and of the equity portion of Balanced Fund has been in existence since before the commencement of this action and continued until the date of trial. The facts demonstrating the mirror-image character of the major portion of the two Funds are undisputed and are set forth in §§3(a)(xiv) through (a)(xxi) of the Pre-trial Order.

14. Plaintiffs' principal contention is that the Funds are so similar that their assets should be aggregated for fee purposes with an alleged attendant saving to the shareholders through the step-down in the fee. However, defendants' evidence shows that eleven of the eighteen largest mutual fund complexes in the nation calculate management fees separately for each fund in the complex. The testimony and the studies produced by defendants, unchallenged by any contrary plaintiffs' evidence, demonstrate that at least four of the fund complexes which do aggregate assets for fee calculation purposes charge an amount which is substantially higher than the sum of the fees charged to Stock Fund and Balanced Fund. (See Transcript at 28-32.)

15. Witnesses produced by defendants testified that, if the Funds were merged or their assets aggregated for fee computation purposes, the Adviser would attempt to renegotiate the advisory agreements to raise the asset point at which the step-down is applied and the directors of the Funds would be open to such a renegotiation. While the Court need not make such a finding, the Court does conclude that the plaintiffs have failed to establish by a fair preponderance of the evidence their claim that a reduction in the total amount of the fees charged would result from a merger or aggregation of the Funds.

16. The evidence demonstrates that the directors of each Fund have at all times pertinent been fully informed of the expenses of each Fund as well as of the profit to the Adviser derived from managing each Fund. In addition, the Adviser has always provided the Funds with studies comparing fees and performance to that of other mutual Funds. On the basis of uncontradicted evidence, the Court finds that each Fund's board of directors has, as to its Fund, determined independently and consistently that all expenses and fees paid to the Adviser are fair and reasonable in amount. This finding is applicable to all directors of both Funds, including those who are affiliated with the Adviser or interested in

the advisory contracts as well as all those who are neither affiliated nor interested within the meaning of the Investment Company Act.

17. Testimony taken from two of the Funds' outside directors demonstrates that they understand the nature of their statutory duty to pass upon the advisory contracts between the Adviser and the Funds. At all times required by the Act, the board of each Fund, including the unaffiliated directors, has unanimously approved the respective advisory agreements. The Court finds that these votes of approval have been based upon a full and adequate understanding of the nature of the operation of the Funds and the Adviser.

18. The investment advisory contracts of the Funds have been approved, during the period in question, by a majority of the outstanding voting securities of each Fund or by votes of the boards of directors, as required by law. In each year from 1968 to date, the shareholders have voted their approval of the advisory contracts by an overwhelming majority of those voting; see Pre-trial Order §3(a)(xxii).

19. Prior to each Fund's annual shareholder meeting, proxy statements have been mailed to each shareholder as required by the Investment Company Act. Aside from the

failure of the statements to describe plaintiffs' alleged plan to reduce the fee, plaintiffs have not indicated any aspect of the proxy statements which they claim are false or misleading.

20. Notwithstanding full disclosure of the claim asserted in this lawsuit, the shareholders of each Fund have continued to vote overwhelmingly to approve the advisory contracts during the pendency of this action.

Conclusions of Law

1. This Court has jurisdiction over the subject matter of this lawsuit pursuant to 15 U.S.C. §80a-43 and 15 U.S.C. §80b-14.

2. Plaintiffs' allegation of a close relationship and overlap between the board members of the Funds and the partners of the Adviser serves to satisfy the requirement of Rule 23.1 Fed.R.Civ.P. that plaintiffs demonstrate that any demand on the boards of the Funds to institute this action would have been futile; see Boyko v. Reserve Fund, Inc., 68 F.R.D. 692 (S.D.N.Y. 1975).

3. Plaintiffs may not rely upon 15 U.S.C. §80a-35, which empowers only the Securities and Exchange Commission to bring an injunction action for breach of fiduciary duty; see Monheit v. Carter, 376 F. Supp. 334 (S.D.N.Y. 1974) (Tyler,

J.); but see Moses v. Burgin, 445 F. 2d 369 (1st Cir. 1971).

4. In order to succeed on their claim in Count One that the management fees were so excessive as to violate 15 U.S.C. §80a-36, plaintiffs must demonstrate a wilful conversion by defendants and that the amount of the fees are so "shocking" that no director with sound business judgment would approve them; see Acampora v. Birkland, 220 F. Supp. 527, 548 (D. Colo. 1963); Saxe v. Brady, 184 A.2d 602, 610 (Ch. Del. 1962) (Seitz, Chancellor).

5. "When the stockholders ratify a transaction, the interested parties are relieved of the burden of proving the fairness of the transaction. The burden then falls on the objecting stockholders to convince the court that no person of ordinary sound business judgment would be expected to entertain the view that the consideration was a fair exchange for the value which was given." Saxe v. Brady, supra, at 610.

6. In determining whether the fees charged by the Adviser are excessive, the Court may compare the rate of the fees to that prevalent in the mutual fund industry; see Acampora v. Birkland, supra, at 540; Saxe v. Brady, supra.

7. "[T]he fact that a more equitable scheme could be worked out, or that this writer sees potential abuses in the method, does not furnish a basis for an adjudication of excessiveness." Acampora v. Birkland, supra, at 549.

8. "Courts interfere seldom to control such discretion intra vires the corporation, except where the directors are guilty of misconduct equal to a breach of trust. . . ." United Copper Securities Co. v. Amalgamated Copper Co., 244 U.S. 261, 263-64 (1917) (Brandeis, J.).

9. Even though the term "wilful conversion" in 15 U.S.C. §80a-36 "was included to cover more territory and therefore ought not be limited to larceny and embezzlement," Brown v. Bullock, 294 F.2d 415, 419 (2d Cir. 1961) (en banc), what in essence is involved here is the exercise of good business judgment; see Tannenbaum v. Zeller [Current Binder] CCH Fed. Sec. L. Rep. ¶95,257 (S.D.N.Y. July 30, 1975).

10. Upon consideration of all the evidence, including that of overwhelming shareholder approval, and in particular the fact that the fees charged to the Funds, even if combined, are lower than many others in the industry, the Court concludes that plaintiffs have failed to establish by a fair preponderance of the evidence their claim that the fees charged the Funds by the Adviser are so excessive as to

constitute a violation of 15 U.S.C. §80a-36.

11. Plaintiffs have also failed to establish, as charged in Count Two, that the Funds and the Adviser are liable for contracting for excessive fees in violation of 15 U.S.C. §80a-35(b). In this regard, the statute specifically allows the Court to consider the approval of the fees by the directors and shareholders; see Id. §80a-36(b).

12. Plaintiffs have failed to establish, as charged in Count Three, that the directors of the Funds approved the fee contracts in violation of their fiduciary duties under the Investment Company Act or at common law; see Saxe v. Brady, supra.

13. Plaintiffs' Fourth Count charges that the Adviser has defrauded the Funds in violation of the Investment Advisers Act, 15 U.S.C. §80b-6. This section requires that the advice given to the Fund by the Adviser be disinterested; see Securities and Exchange Commission v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963).

14. Plaintiffs have failed to demonstrate by the required clear and convincing evidence, or for that matter by a fair preponderance of the evidence, that the Adviser works a fraud upon the Funds through its failure to advise the Funds to merge or aggregate assets for fee computation

purposes; see Jones Memorial Trust v. Tsai Investment Services, Inc., 367 F.Supp. 491, 499 (S.D.N.Y. 1973).

15. In Count Five, plaintiffs assert that the Adviser and the partners of the Adviser failed to disclose to the Funds the exact amount of compensation being paid to the Adviser, in violation of 15 U.S.C. §80a-15(a). The Court finds that this claim is unsupported by the evidence. Further, plaintiffs argue generally that the failure of the Adviser and the inside directors to disclose to the outside directors a possible method to reduce the fee constituted a violation of the rule set forth in Fogel v. Chestnutt [Current Binder] CCH Fed. Sec.Rep. ¶95,393 (2d Cir. December 30, 1975), following Moses v. Burgin, supra.

16. "[U]nder the scheme of the Investment Company Act an investment adviser is 'under a duty of full disclosure of information to. . . unaffiliated directors in every area where there was even a possible conflict of interest between their interests and the interests of the fund.'" Fogel v. Chestnutt, supra, at 98,992.

17. In Fogel, the outside directors were unaware of the possibility of brokerage commission recapture, and thus they needed information from the insiders; see Id. at 98,995. In this case, the option of aggregating assets for

fee computation purposes, engaged in by a number of other mutual fund complexes, was known to the outside directors and thus there was no need for disclosure of the option. Further, since the Court has found that aggregation would not necessarily have reduced the total fee, the directors were not required to engaged in "doubtful experiments virtually unsupported by custom or convention or court decision."

Moses v. Burgin, 316 F. Supp. 31, 57 (D. Mass. 1970), reversed in part, 445 F. 2d 369 (1st Cir. 1971).

18. Even assuming that, under Moses and Fogel, the Adviser had a duty to disclose to the unaffiliated directors the option of aggregation of assets for fee purposes, that duty of disclosure was fully satisfied by the reports made to the outside directors which compared the performance and fees of other funds in the industry to that of Stock Fund and Balanced Fund. Plaintiffs have failed to carry their burden of proof on Count Five of the Complaint.

19. Plaintiffs have failed to establish by a fair preponderance of the evidence that the proxy statements sent to the shareholders of the Funds were false or misleading in violation of 15 U.S.C. §§80b-6 and 80b-7 for their failure to disclose plaintiffs' allegation that significant savings could be achieved if the assets of the Funds were

aggregated. In fact, in this Court's view, if the proxy statements had stated that there would be significant savings in the fees as a result of aggregation, such a statement could have been false and misleading.

20. Judgment should be entered for defendants dismissing all counts of the Complaint with prejudice and with costs.

Submit Order

Dated: New York, New York  
June 21, 1976

S/

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LAWRENCE W. PIERCE  
U. S. D. J.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x

CHARLES R. WOLFSON, RICHARD R.	:	
WOLFSON and LOUIS OKIN, as	:	ORDER AND
Executors of the Estate of	:	<u>JUDGMENT</u>
NATHANIEL C. WOLFSON, deceased,	:	
and HERBERT A. FUENTE,	:	
	:	72 Civ. 2238 (LWP)
Plaintiffs,	:	
-against-	:	
R. DOUGLASS COOPER, CHARLES FARNHAM,	:	
HARRY HAGEY, JR., LAWRENCE HICKEY,	:	
LEMUEL HUNTER, JOHN JEUCK, SYDNEY	:	
STEIN, JR., RICHARD TEMPLETON,	:	
HENRY THIELBAR, JOHN TITTLE, ROBERT	:	
WOODS, SR&F SERVICE CORPORATION,	:	
WACKER-ADAMS DATA SERVICE CORP.,	:	
STEIN ROE & FARNHAM, STEIN ROE &	:	
FARNHAM STOCK FUND, INC., and	:	
STEIN ROE & FARNHAM BALANCED FUND,	:	
INC.,	:	
Defendants.	:	

----- x

The issues in the above-entitled action having been brought on regularly for trial before the Honorable Lawrence W. Pierce, United States District Judge, on April 14 and 15, 1976, and at the conclusion of the evidence (i) the plaintiffs having voluntarily discontinued the action as against SR&F SERVICE CORPORATION and WACKER-ADAMS DATA SERVICE CORP., (ii) the Court having dismissed the complaint as against R. DOUGLASS COOPER, CHARLES FARNHAM, HARRY HAGEY, JR., LAWRENCE HICKEY, LEMUEL HUNTER, JOHN JEUCK, SYDNEY STEIN, JR., RICHARD TEMPLETON, JOHN TITTLE and ROBERT WOODS for failure of plaintiffs to effect service upon them, and (iii) the Court having reserved decision as to the remaining defendants, and the Court thereafter on June 21, 1976, having filed its

Memorandum Opinion containing its findings of facts and conclusions of law in favor of the defendants, it is

ORDERED, ADJUDGED AND DECREED that defendants HENRY THIELBAR, STEIN ROE & FARNHAM, STEIN ROE & FARNHAM STOCK FUND, INC. and STEIN ROE & FARNHAM BALANCED FUND, INC., have judgment on the merits dismissing the complaint, that plaintiffs take nothing and that ~~defendants recover~~ <sup>each party shall bear</sup> their <sup>own</sup> costs.

Dated: New York, New York

June 24, 1976

S/  
Lawrence W. Pierce, U.S.D.J.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
CHARLES R. WOLFSON, et al.

Plaintiffs,

-against-

R. DOUGLASS COOPER, et al.

Defendants.

:  
:  
: T2 CIV. 2238 (LWP)  
:  
:  
:-----X

STATE OF NEW YORK }  
COUNTY OF NEW YORK } ss.:

Bennett Frankel being duly sworn, deposes and  
says:

I was plaintiffs' trial counsel and make this  
affidavit in opposition to so much of the proposed judgment  
as requires plaintiffs to pay costs.

This was a stockholders derivative action in which  
the plaintiffs had no expectation of any personal gain. The  
action was brought solely for the benefit of the two mutual  
funds involved. Any recovery would have gone to the two  
funds. Under these circumstances, in the exercise of dis-  
cretion, there should be no requirement that plaintiffs pay  
costs.

The last six words in the proposed Order should be  
deleted.

\_\_\_\_\_  
Bennett Frankel

Sworn to before me  
this 23rd day of June 1976

SAUL A. FINKEL  
Notary Public, State of New York  
No. 311217500  
Qualified in New York County  
Commission Expires March 30, 1977.

204 A

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



-----X  
CHARLES R. WOLFSON, et ano., :

Plaintiffs, :

-v- :

72 Civ. 2238

R. DOUGLASS COOPER, et al., :

Defendants. :

-----X  
ORDER


Page 17 of the Court's Memorandum Opinion  
dated June 21, 1976 is hereby corrected as follows:

Line 5:

"20. Judgment should be entered for  
defendants dismissing all counts of the complaint with  
prejudice; each party shall bear its own costs."

The clerk is directed to attach a copy  
of this order to the Opinion of June 21, 1976.

SO ORDERED.

  
\_\_\_\_\_  
LAWRENCE W. PIERCE  
U. S. D. J.

Dated: June 28, 1976  
New York, N.Y.

Service of ONE COPY copies of the  
within APPENDIX is hereby  
admitted this 29<sup>th</sup> day of  
DEC 1976

Signed Sullivan & Gonnell

Attorney for Defendants Appellants